export trade." This provision immunizes any conduct that "concern[s]" the segment of "through transportation" that occurs inland in foreign countries. Congress also exempted from the antitrust laws other segments of the shipping routes, including foreign port services, 46 U.S.C. app. § 1706(a)(5), ocean transport services, *id.* §§ 1706(a)(1),(2), and domestic port services, *id.*

Congress created these exemptions based on the understanding that "the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill. The Shipping Act exclusively, as administered by the [Federal Maritime Commission], will prescribe the rules, protections, and sanctions necessary to regulate international shipping effectively." S. Rep. No. 97-414, at 26, 34. Congress also heeded concerns expressed by foreign shippers about limiting the reach of U.S. antitrust laws to activities already subject to foreign jurisdiction. *See 1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the Sen. Comm. on Commerce, Science, and Transp.*, 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, Council of European and Japanese Nat'l Shipowners Ass'n) ("Also to be kept in mind is the fact that other countries take strong issue with the application of the antitrust laws as well as the Shipping Act to transportation arrangements and activities performed within their jurisdictions.").

3. The Ninth Circuit determined the scope of Section 1706(a)(4)'s exemption in *United States v. Tucor Int'l, Inc.*, 189 F.3d 834, 836 (9th Cir. 1999), which involved conduct almost identical to that at issue here. In *Tucor*, the United States alleged that foreign carriers operating in the Philippines conspired with others to suppress competition by fixing prices for the transportation of military household goods between the Philippines and the United States. *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172, 1175 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (citing Indictment ¶ 2). According to the United States, the defendants entered into

"a price-fixing agreement whose purpose and effect were to force the United States government to pay supra-competitive prices to move U.S. Servicemen's household goods between the United States and the Philippines." Reply Br. for U.S. at 1, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33612244, at *1); *see also Tucor*, 35 F. Supp. 2d at 1184.

In *Tucor*, the defendant initially pled guilty, *id.* at 1175-76, but subsequently filed a petition for a writ of error coram nobis, arguing that the conduct alleged in the indictment was covered by § 1706(a)(4)'s exemption, and was thus lawful. *Id.* at 1176-77. The district court, per Judge Lowell Jensen, agreed and dismissed the indictment.[4] In so concluding, Judge Jensen rejected the Government's argument that the exemption must be construed narrowly. *Id.* at 1180-85 ("Section [1706(a)(4)]'s immunity means what it says"). The court also faulted the lead trial attorney for the Department of Justice for violating his duty of candor by failing to bring attention to the exemption prior to submitting the plea agreement. *Id.* at 1187-88. The Ninth Circuit affirmed, holding that § 1706(a)(4) "clearly applies to any agreement—without limitation—concerning the foreign inland segment of through transportation." 189 F.3d at 837.

4. The *Tucor* decision was publicized and well-known throughout the shipping community. Two years later, acting in reliance on the decision, petitioners engaged in conduct substantially similar to that upheld as lawful by the Ninth Circuit. *See* App. 50a (finding "based upon the Ninth Circuit's decision in *Tucor*, that the Defendants acted in good faith in considering their actions immune from the

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[4] Prior to his appointment to the federal bench, Judge Jensen served as Deputy Attorney General of the United States, Associate Attorney General, and Assistant Attorney General for the Criminal Division.

antitrust laws"). Yet, in a classic case of forum shopping, the Government decided to bring criminal charges against petitioners in the Fourth Circuit. As they had charged the *Tucor* defendants, so too the Government charged petitioners with conspiring with others to eliminate competition by fixing prices for the transportation of military household goods between Germany and the United States. App. 67a. *Cf. Tucor*, 35 F. Supp. 2d at 1175 (citing Indictment ¶ 2).

According to the agreed-upon Statement of Facts, the alleged antitrust conspiracy arose in 2001, after a freight forwarder (identified in the stipulated facts as "FF-1") filed a prime rate for several German-United States routes that was significantly lower than any other freight forwarder's rate. App. 30a. Gosselin's managing director and another local German agent expressed concern that if other carriers matched that low bid, the German agents might be forced to provide services on those routes at an unprofitable rate. As the local German agent explained, "if we do not react and give [the] industry a clear message which rate to base the m/2 [the "me-too" bid] on, then everyone will use the low rate and later expect us to reduce our rates so those carriers can work under their m/2 rates." App. 31a.

Gosselin's managing director suggested that the German agents agree to service only shipments tendered at the second lowest rate (rather than FF-1's prime rate). App. 32a; 62a. The director forwarded this exchange to Pasha's chief executive. Subsequently, twelve of the largest German agents, including Gosselin's subsidiary, entered into an agreement to boycott any freight forwarder that failed to "submit[] me-too bids at the second-low level or above." App. 31a, 63a. Gosselin and another agent advised the freight forwarders by fax of the agreement among the local German agents. App. 32a, 63a-64a. FF-1 subsequently agreed to cancel the low prime rate it initially had filed, and the other freight forwarders tendered me-too bids at the second lowest rate or higher. App. 32a, 64a.

5. The United States arrested Gosselin's managing director at a trade-association conference in Hawaii in October 2003, but conditioned his release upon his consent to venue in the Eastern District of Virginia. *See* http://www.usdoj.gov/atr/public/press_releases/2003/201377.pdf. Charges against the director were ultimately dropped, but the United States charged petitioners by information with a conspiracy to restrain trade, in violation of 15 U.S.C. § 1, and a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. App. 25a. The fraud charge was not based on any misrepresentation or omission separate from the antitrust conspiracy. Gosselin and Pasha entered into plea agreements conditioned upon the outcome of rulings on the applicability of the Shipping Act's antitrust exemptions to a stipulated Statement of Facts and on whether the stipulated facts established fraud. App. 25a.

Applying the plain meaning of § 1706(a)(4)'s exemption, the district court held that petitioners' conduct "concern[ed]" the "foreign inland segment" of the through transportation route between the United States and Germany, and therefore did not violate federal law: Gosselin, through its subsidiary, provided local agent services in Germany; local German agents provided packing and moving services in Germany; Gosselin and Pasha arranged for local German agent services, as well as European port agent services, and the fixed rate ocean transport services. App. 41a-42a (citing Criminal Information ¶¶ 3, 10, 12). Moreover, the district court held, even assuming petitioners were not immune, the rule of lenity required construction of the antitrust exemption in petitioners' favor. App. 43a. The district court rejected the United States' contention that *Tucor* was not applicable, concluding that in *Tucor*, as here, "the Government charged the defendant with agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates." App. 42a.

The district court also held that petitioners were entitled to immunity based on other sections of the Shipping Act.

Petitioners' activity was exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus immune under § 1706(a)(2) of the Shipping Act. App. 45a-49a. And, even if neither § 1706(a)(4) nor § 1706(a)(2) applied, the district court held that § 1706(c)(1) of the Shipping Act prohibited the retroactive imposition of immunity, because petitioners had acted in good faith in relying on *Tucor* and could have reasonably concluded that their conduct was immune from U.S. antitrust laws. App. 49a.

Finally, the district court determined that, notwithstanding the antitrust immunity, the United States had established a fraud charge because the two charges were not duplicative and the immunity only extended to the antitrust laws. App. 51a. Petitioners each pled guilty to the conspiracy to fraud count, and the district court imposed on each defendant a criminal fine of $4.6 million. App. 7a.

6. The Fourth Circuit reversed the district court's immunity ruling. In the court's view, the case was governed by the rule of construction requiring that exemptions to the antitrust laws be narrowly construed. *See* App. 8a ("[I]f there is any doubt over whether § 1706(a)(4) affords defendants relief, it is settled by the maxim that exceptions to the antitrust laws should be construed narrowly."). Accordingly, the Fourth Circuit determined that, even if petitioners' initial agreement with the local German agents related to the "foreign inland segment," petitioners' communication of that agreement to the freight forwarders was aimed at fixing rates for the entire through transportation route. App. 13a. The Fourth Circuit held that it need not decide whether *Tucor* was correct because the *Tucor* defendants' conduct supposedly occurred entirely within the foreign country, whereas in the instant case, petitioners communicated their "bid-rigging plan" to freight forwarders responsible for the overall through rate. App. 12a. The Fourth Circuit expressed concern that a broad immunity would exempt the through transportation market completely,

neglecting the fact that Congress already has chosen to exempt from the antitrust laws several other portions of through transportation, including the ocean transport rate. *Id.*

The Fourth Circuit also held that petitioners' conduct was not immune under § 1706(a)(2) and § 1706(c)(1). App. 12a-20a. Because the court had concluded that petitioners enjoyed no antitrust immunity, the court did not reach the question whether the Government stated a fraud claim, if petitioners did nothing more than fail to disclose otherwise lawful conduct. App. 20a-21a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A STARK CIRCUIT CONFLICT AND, CONTRARY TO THE SHIPPING ACT, SUBJECTS FOREIGN SHIPPING TO THE U.S. ANTITRUST LAWS.

The petition for certiorari should be granted because the Fourth Circuit decision creates a sharp conflict with the Ninth Circuit on a matter of substantial importance to the international shipping community. Congress enacted section 7(a)(4) of the Shipping Act of 1984 to prevent the federal antitrust laws from reaching into domains subject to the jurisdiction of other sovereigns. *See* 46 U.S.C. app. § 1706(a)(4); S. Rep. No. 97-414, at 26, 34 (1982) ("[T]he antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill.").

This case presents the second time in recent years that the Government has sought to flout those limitations, not merely through a civil action, but through a criminal prosecution against companies whose operations are centered abroad and subject to foreign law. The Ninth Circuit properly restrained the Government's first prosecution, and the district court sought to do the same in this case. Five federal judges, one of whom had guided the prosecutorial function of the Department of Justice, roundly

rejected the government's prosecutorial adventurism. But the Justice Department doggedly pressed on, and finally found a receptive judicial ear in Richmond. Driven by the presumption that the exemption must be narrowly construed, the Fourth Circuit has not only exposed petitioners to prosecution, but it has opened the door to any future prosecutions that the Government may bring in the Fourth Circuit. The decision below neglects the principle of international comity embodied in the antitrust exemptions and in this Court's decision in *Hoffman-LaRoche*. In order to resolve the conflict among the circuits, to restore comity in ongoing bilateral relationships, and to prevent future conflicts between the U.S. and foreign antitrust laws, the petition for certiorari should be granted.

A. The Court of Appeals' Decision Creates A Clear Circuit Conflict.

The Fourth Circuit's decision creates a square conflict with that of the Ninth Circuit. Both *Tucor* and this case addressed identical conduct: an agreement with the purpose and effect of protecting foreign shipping agents by raising the price paid to move U.S. military household goods between a foreign country and the United States. In both cases, the foreign inland agents sought to use their market power to induce the prime contractors, the freight forwarders, to raise the bids submitted to the MTMC. *Compare Tucor*, 189 F.3d at 838 (rejecting the Government's argument that "the conduct alleged in the indictment was not 'through transportation'"), *with* App. 11a-12a ("defendants fixed bids for through transportation rates"). And the question before both the Fourth and Ninth Circuits was whether this activity "concerns" the "foreign inland segment" of the transportation route.

The two circuits, however, answered this question in sharply opposite ways. In *Tucor*, the Ninth Circuit unambiguously held that § 1706(a)(4) "clearly applies to any agreement—without limitation—concerning the foreign

inland segment of through transportation." 189 F.3d at 837. The court rejected the United States' attempt to construe the exemption narrowly, holding that the conduct charged in the indictment—"agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates," App. 42a; *see also Tucor*, 189 F.3d at 837 (citing *Tucor* Indictment)—fell squarely within the scope of § 1706(a)(4).

By contrast, the Fourth Circuit held that precisely the same activity fell *outside* § 1706(a)(4). App. 11a. According to the Fourth Circuit, the conduct was aimed "at the entire through transportation market, rather than *just* the foreign inland segment," App. 11a-12a (emphasis added), because petitioners sought to raise their profits as subcontractors by inducing the prime contractor to place a higher bid.

Although the facts in *Tucor* and here were materially identical, the Fourth Circuit refused to acknowledge its break with the Ninth Circuit. Instead, it stated it had no occasion to decide whether *Tucor* was correct because, the *Tucor* defendants' conduct was allegedly confined to a foreign country, while here petitioners "took additional steps to perfect their bid-rigging plan" by communicating the German agents' agreement to the freight forwarders in an effort to get them to withdraw, or not match, the initial low bid for the overall transportation route. App. 12a.

In truth, the distinction identified by the Fourth Circuit does not exist. In *Tucor*, the defendants also sought to "cause freight forwarders to cancel their low rates" submitted to MTMC for through transportation. App. 42a. The alleged conspiracies were virtually identical: in both cases, the subcontracting foreign agents reached an agreement among themselves to raise the prices that they receive by the only means possible, by inducing the freight

forwarders to raise the final bids approved by the MTMC.[5] And of course, the United States brought criminal charges solely because of the direct and foreseeable impact that the defendants' conduct was alleged to have on the through rate—the only price that the United States pays for shipping services.

The United States itself argued in *Tucor* that the defendants entered into "a price-fixing agreement whose purpose and effect were to force the United States government to pay supra-competitive prices to move U.S. Servicemen's household goods between the United States and the Philippines." Reply Br. for U.S. at 1, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33612244, at *1). Similarly, the Government recognized in *Tucor* that the conspirators' "conduct, though involving motor carriers located in the Philippines[,] ***target[ed] only the United States***." *Id.* at *1-2 (emphasis added). Thus,

[5] The only difference in fact was that in *Tucor*, the foreign agents collectively agreed to do business with two freight forwarders, thus "caus[ing] all but the two forwarders with the highest rates on file to cancel their rates w[illegible] DoD." Br. for U.S. at 5, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33607721, at *5). By contrast, here, the foreign agents informed the freight forwarders that they would do business only with carriers who placed bids at the second-lowest rate, and therefore the low bidder, FF-1, replaced its original bid with a new bid at the second-lowest rate. App. 30a-32a. Both sets of agreements, however, necessarily involved the foreign agents communicating their agreements to freight forwarders in the United States and inducing the freight forwarders to withdraw or cancel the lowest through rates on file. Thus, contrary to the Fourth Circuit's conclusion, both "concern" the "foreign inland segment" and the "through rate" in the exact same way.

there can be no serious argument that the conspiracy found by the Fourth Circuit had any different relation to the overall through rate than that considered by the Ninth Circuit in *Tucor*.

Indeed, as the Statement of Facts demonstrates, those additional steps flow directly from what is the crux of the alleged conspiracy (just as in *Tucor*): an agreement among local German agents (including Gosselin's subsidiary) to boycott any freight forwarder who matched FF-1's low rate, in order to ensure that other freight forwarders would not bid a low rate and then compel the local German agents to reduce their own rates for the foreign inland segment. *See* App. 30a-32a, 62a-63a. The foreign inland segment is only one segment of the through transportation, and when freight forwarders submit bids to MTMC, their bids must cover the costs for all segments (some of which, such as the ocean transport rate, are fixed by a conference of ocean carriers). A low bid for the entire through transportation route thus would reduce the rate that service providers on the foreign inland segment could charge. Petitioners, as general agents, were engaged in the business of negotiating the rate for foreign services with freight forwarders, and Gosselin itself performed local services. App. 60a. Thus, their interests arose out of the foreign inland segment.

The so-called "additional steps" that petitioners took were nothing more than steps to ensure that local German agents could maintain the rates they were charging for the foreign inland segment. Those steps included informing freight forwarders about the local German agents' agreement, and securing from freight forwarders an agreement to file bids at or above the second lowest rate, App. 17a. The Fourth Circuit suggested that these steps reflected "defendants' desire that FF1 withdraw the prime through rate bid it had filed with MTMC," but petitioners, like the defendants in *Tucor*, were only interested in such an action insofar as it would lead to a higher rate for the foreign inland segment. Were the prime rate not withdrawn, the

local German agents' agreement would have been meaningless, because the business available from freight forwarders would likewise have been at the prime rate.

The Fourth Circuit's attempt to distinguish *Tucor* is thus unavailing. Having lost in the Ninth Circuit, the United States did attempt to do one thing differently in the second prosecution: The information here charges the freight forwarders as unindicted "co-conspirators" that "agreed" to file higher through rates, whereas the *Tucor* indictment describes the freight forwarders as the "victims" of the conspiracy. But neither the Fourth Circuit nor the Government has explained how this distinction makes any legal difference. The underlying economic conduct is precisely the same: an agreement among local providers to ensure that the shipping contracts go to freight forwarders who bid at higher through transportation rates so as to ensure a higher foreign service rate.

Because, as this case demonstrates, the United States may choose the forum in which to bring a criminal indictment, there will be little, if any, opportunity for another circuit to weigh in on the scope of the exemption and the shipping community will remain subject to the liability standard of the Fourth Circuit. Add to that the likelihood that most of the charged companies will quickly settle with the Government, and this case presents the best (if not the only) vehicle in which to impose uniformity among the circuits and to vindicate the congressional purpose in crafting an exemption here to limit the extraterritorial reach of the antitrust laws.

B. The Court of Appeals' Decision Misconstrues the Shipping Act Exemption.

The decision below not only creates a clear split with the Ninth Circuit, but it stands foursquare on the wrong side of that split. Section 1706(a)(4) grants immunity to "any agreement or activity concerning the foreign inland segment

of through transportation." The charged conspiracy was initiated by local German agents worried about the price pressure from the initial through rates, and it was those agents' market pressure that forced freight forwarders to withdraw the prime through rates. Under any reasonable construction of the statute, petitioners' participation in formulating these agreements and communicating them to freight forwarders "concerned" the "foreign inland segment" of through transportation.

The Fourth Circuit, however, held that petitioners could be held criminally liable because their conduct concerned more than simply the inland segment. That was error. Section 1706(a)(4) does not require that the charged activities *solely* concern the foreign inland segment. Indeed, Congress specifically removed such language from an earlier draft of the exemption. *See* S. 1593, 97th Cong. § 8(a), at 15 (1981). The Fourth Circuit's contrary position departs from this text and history, and asserts U.S. jurisdiction over conduct that Congress intended to leave in the hands of foreign regulators.

1. The Fourth Circuit Misapplied The Rules Of Statutory Construction.

Because the Shipping Act exemption is clear, the Fourth Circuit needed to look no further than the words of the statute. Yet the Court of Appeals began its analysis on the wrong foot by starting with the interpretive premise that "exemptions from antitrust laws" should be "narrowly" construed. App. 8a. This Court has articulated that canon of construction in *civil* cases concerning *domestic* conduct. But the setting here is dramatically different, because the government prosecution runs into two competing canons with a far greater claim to application: (1) the Court "ordinarily construes ambiguous statutes to avoid unreasonable interferences with the sovereign authority of other nations," *Hoffman-LaRoche*, 124 S. Ct. at 2366, and (2) the Court "traditionally exercise[s] restraint in assessing

the reach of a federal criminal statute," *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2134 (2005) (internal quotations omitted). The Court of Appeals ignored both canons and, in so doing, extended the antitrust canon into an area in which it did not belong.

a. This Court has "construed the reach of exemptions from antitrust laws narrowly" on the ground that "robust marketplace competition" reflects a "'fundamental national economic policy.'" App. 8a (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966)). This salutary principle has little application, however, where the conduct at issue occurs primarily in a foreign nation and thus implicates not our "national economic policy," but the economic policy of a foreign sovereign.

Indeed, *Hoffman-LaRoche* makes this point crystal clear. In that case, the Court was called on to interpret an ambiguous provision of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which excluded from the antitrust laws foreign anticompetitive conduct, except where the conduct had a "substantial" effect on domestic commerce that would give rise to a domestic Sherman Act claim. 124 S. Ct. at 2363. The plaintiffs in that case were foreign citizens who sought to recover under the U.S. antitrust laws based on a price-fixing conspiracy that raised vitamin prices in their countries, as well as in the United States.

In the course of interpreting the FTAIA's exemption to the antitrust laws, this Court at no time invoked the principle of narrow construction that the Fourth Circuit found so persuasive here. To the contrary, every member of the Court agreed that the controlling canon of interpretation rose from the need to respect international comity. *See Hoffman-LaRoche*, 124 S. Ct. at 2366 (citing the need to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"); *id.* at 2373 (Scalia, J., with Thomas, J., concurring in judgment) ("[S]tatutes

should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.").

As the Court explained, the reason for this canon is clear:

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.

Id. at 2366. In addition to relying on the presumption to resolve the statutory ambiguity, the Court noted that the FTAIA's "language and history" suggested that the statute was intended "to clarify, perhaps to limit, but not *to expand* in any significant way," the Sherman Act's scope. *Id.* at 2369. Therefore, the fact that the Court was construing a specific exemption counseled against reading the antitrust laws to apply to conduct that had not previously been recognized as falling within the statute's reach.

Just as the Court applied this rule in *Hoffman-La Roche*, the Fourth Circuit should have applied it here. In crafting the antitrust exemption to the Shipping Act, Congress broadly intended to exclude from the U.S. antitrust laws "any agreement or activity concerning the foreign inland segment of through transportation that is part" of the U.S. import or export trade. 46 U.S.C. app. § 1706(a)(4). As both the text and history make clear, the very purpose of that amendment was to prevent U.S. law from "wrongfully invad[ing] the jurisdiction of trading partner sovereigns." *Tucor*, 35 F. Supp. 2d at 1182 (quoting *1981 Shipping Act Hearing*, *supra*).

Therefore, as in *Hoffman-LaRoche*, this is not just a case where "principles of prescriptive comity counsel against the Court of Appeals' interpretation." 124 S. Ct. at 2369. This is a case where the text and the history of the statute make clear that Congress itself enacted the measure out of respect for the very principles identified by the canon of construction. The conduct at issue is fully subject to the review and enforcement activities of the German antitrust authorities, which as discussed below, have already taken action based on the facts in this case. The Court of Appeals erred by applying a principle of "narrow construction" instead of the canon of construction articulated by *Hoffman-LaRoche*.

b. In addition to neglecting important comity concerns, the Court of Appeals erred by neglecting the principle that criminal statutes should be narrowly construed. As this Court explained just last Term:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."

Arthur Andersen, 125 S. Ct. at 2134 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)) (other internal quotations omitted). The Court of Appeals should have given this principle full application, particularly where, as here, petitioners did not merely rely on a reasonable reading of the statute; they relied on *Tucor*, the only Court of Appeals decision on the books at the time of the conduct.

The Fourth Circuit, however, held that the principle that antitrust exemptions should be narrowly construed trumped any concern for restraint on the criminal prosecution. *See*

App. 8a. Not one of the seven cases cited by that court, however, concerned the application of that rule to a criminal prosecution. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-33 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309 (1956); *United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939). All but one involved civil actions under the antitrust laws, and the only criminal case cited, *Borden*, did not hold that congressionally created exemptions should be narrowly construed against a criminal defendant.[6] Insofar as petitioners are aware, the criminal prosecution in this case is the first one on record in which the Government has chosen to bring a criminal prosecution, rather than a civil action, against individuals who had relied on an interpretation of the statute supported by federal court precedent. Such a prosecution runs directly contrary to the rule of construction applied in *Arthur Andersen*, *Aguilar*, and many other cases, requiring that criminal defendants be given "fair warning" of the illegality of their activities.

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[6] In the portion of the opinion cited by the Fourth Circuit, defendants argued that, although their conduct ran afoul of the antitrust laws, immunity should be *implied* based on obligations under a parallel federal regulatory regime. This Court rejected that argument recognizing that "repeals by implication are not favored." *Borden*, 308 U.S. at 198. *Borden* considered an express antitrust exemption later in the opinion, but it did not invoke any principle of construction, because the express exemption—which required participation in government-led industry mediations—clearly did not apply to the wholly private conduct at issue. *See id.* at 201.

The Fourth Circuit held that the "traditional tools of statutory construction" had removed any statutory ambiguity from the exemption, and therefore, there was no cause to resort to the rule of narrow construction articulated in *Arthur Andersen* and underlying the parallel "rule of lenity." *E.g.*, *Rewis v. United States*, 401 U.S. 808, 812 (1971). There is nothing "traditional" about narrowly construing an antitrust exemption to criminalize arguably legal conduct. For the reasons explained above, the text, history, and applicable canons of construction run precisely in the other direction. The Court of Appeals' contrary conclusion was erroneous and warrants this Court's review.

2. The Decision Ignores The Plain Language Of The Exemption.

Relying on a misleading rule of construction, the Court of Appeals misread the statute. As the Fourth Circuit recognized, the statutory question is whether petitioners' conduct constituted "agreement or activity" "concerning" the "foreign inland segment of through transportation." The Fourth Circuit, however, refused to give this term its natural meaning and instead ruled that the agreements must *either* concern the "foreign inland segment" or the entire transportation route. That is a false choice. As a matter of logic and law, an agreement can "concern" *both* the broader through market and the inland submarket; given the facts of this case, there can be no question that petitioners' activity did concern the foreign inland segment.

a. The statutory question begins with the plain meaning of the statute. *E.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The dictionary defines "concern" to mean "to relate to" or "to be about." Webster's Third New Int'l Dictionary 470 (1981). This Court similarly has recognized that there are many ways in which one thing may "relate to" another. The term is "highly general," and the Court has "interpreted it broadly." *Barnett Bank of Marion*

County, N.A. v. Nelson, 517 U.S. 25, 38 (1996); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (words "relate to" have "broad common-sense meaning") (internal quotation omitted).

Petitioners' conduct thus can be said to "concern" the foreign inland segment if it "relates" in some meaningful way to that segment. The Fourth Circuit accepted petitioners' argument that "[t]he first step in this scheme ... was the agreement with twelve large German local agents to handle no business from forwarders who filed bids below the second level," and the court also accepted that "the success" of the scheme "depended entirely on the viability of the arrangement defendants had reached with the local German firms." App. 11a. That should have been enough.

Despite this correct premise, the court reached the wrong conclusion: that petitioners' conduct did not "concern" the foreign inland segment, because petitioners took the "additional step" of communicating the German agents' agreement to freight forwarders responsible for bidding on the through transportation contract. That "additional step," however, was hardly something separate from the original agreement. Rather, given that the German agents were subcontractors of the freight forwarders, the German agents could not have effectuated the agreement without communicating that information to those who were actually placing the bid.

The Court of Appeals held that "[b]ecause defendants' collusive effort was aimed at the entire through transportation market, rather than *just* the foreign inland segment, we do not think that they can claim exemption for antitrust liability ...." *Id.* (emphasis added). There is no requirement, however, that the agreements subject to § 1706(a)(4) be targeted at *just*, or *solely*, the foreign inland segment.

b. The Fourth Circuit decision imports an additional limitation into the statute: the requirement that an agreement

"solely" concern the "foreign inland segment" before a carrier may be entitled to immunity. That restriction is not only contrary to the plain words of the statute, but is belied by the drafting history of the statute itself. As the district court recognized in *Tucor*, the original draft of § 1706(a)(4) provided immunity to "any agreement or activity that relates *solely* to transportation services between foreign countries." *See* S. 1593, 97th Cong. § 8(a)(3) (1981) (emphasis added); *see also Tucor*, 35 F. Supp. 2d at 1182 (quoting bill).

At the hearing on the bill, however, a representative of the foreign shipping industry expressed concern that "the word 'solely' ... could be construed, for example, as excluding from the intended antitrust law exemption arrangements by conferences or ocean carriers for inland *foreign* motor, rail or air transportation in connection with intermodal routes and services." *1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science and Transp.* ("*1981 Shipping Act Hearing*"), 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, Council of European and Japanese Nat'l Shipowners Ass'n).

Following this testimony, the bill was reported out of committee with the "solely" limitation removed. The new draft extended the antitrust exemption to "any agreement or activity concerning the inland portion of any intermodal movement occurring outside the United States through part of transportation provided in a United States import or export trade." *See* S. 1593, 97th Cong. § 8(a)(7) (1981). It was that language, with only slight modifications, that became § 1706(a)(4) in the final statute. The Fourth Circuit's attempt to re-import the "solely" limitation back into the statute thus stands at odds not only with the plain text, but also with the drafting history of the statute itself.

The Fourth Circuit reached the conclusion that it did because it believed a contrary reading "would threaten to excise antitrust liability from the through transportation

market completely, because "any firm operating in any segment of any through transportation channel need only execute an agreement with a local moving agent to shield itself from the antitrust laws entirely." App. 13a. That policy rationale reflects a fundamental misunderstanding of the Shipping Act itself, because the exemption for the foreign inland segment is not an isolated exception. Rather, antitrust exemptions already apply to every other segment of the transportation of household military goods.

In addition to the foreign inland segment, the foreign port rates are exempt from the antitrust laws under section 7(a)(5); the ocean transportation rates (which are set collectively by conferences of United States-flag vessels) are exempt under sections 7(a)(1) and (a)(2); the U.S. port rates are exempt under sections 7(a)(1) and (a)(2); and the fifth component, the prices for domestic trucking are exempt under 49 U.S.C. §§ 13703(a)(1) and (a)(6). Congress exempted from the antitrust laws these components of through transportation on the one hand to limit the intrusion of U.S. law into foreign jurisdictions and on the other to leave the domestic components subject to the jurisdiction of the Federal Maritime Commission.[7]

Thus, the Fourth Circuit's cramped reading of the statutory text is hardly necessary to prevent the shipping

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[7] *See, e.g.*, H.R. Rep. No. 98-53, pt. 1 at 3, 12 (1983) ("[T]he Committee intends that violations of this Act not result in the creation of parallel jurisdiction over persons or matters which are subject to the Shipping Act of 1983."); S. Rep. No. 97-414, at 26, 34 (1982) ("Thus, the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill. The Shipping Act exclusively, as administered by the [FMC], will prescribe the rules, protections, and sanctions necessary to regulate international shipping effectively.")

industry from taking advantage of a limited statutory loophole. Rather, the interpretation effectively undermines Congress's intention to leave the antitrust laws outside of an area already subject to the regulation of foreign jurisdictions and the Federal Maritime Commission.

C. The Question Presented In This Case Is Far-Reaching And Of Exceptional Importance.

The petition for certiorari also should be granted because this case presents an issue of exceptional importance regarding the scope of U.S. antitrust laws in today's global economy. As in *Hoffman-LaRoche*, the Court of Appeals has extended the reach of federal antitrust jurisdiction into areas properly subject to the jurisdiction of foreign sovereigns. The decision is of particular concern to the international shipping industry, because it permits the future prosecution of the foreign shipping agents who carry the household goods of our servicemen stationed abroad. More broadly, the decision ignores the principle of prescriptive comity and thus invites the narrow construction of other congressionally imposed limits that are necessary to avoid conflict in "today's highly interdependent commercial world." *Hoffman-LaRoche*, 124 S. Ct. at 2366.

Indeed, the question of foreign jurisdiction is not simply a theoretical one; the German government is currently investigating the conduct at issue here, and it has already made preliminary findings under its own antitrust laws. On November 15, 2004, the Bundeskartellamt, the Federal Cartel Office, issued an Interim Decision dismissing its action against Gosselin's director, Mark Smet, but electing to continue antitrust proceedings against Gosselin and another shipping agent for price-fixing and incitement to boycott. The Cartel Office has not issued a final decision, but the Interim Decision states that the office expects to impose a fine on Gosselin in the range of €2,500,000.

The German government's demonstrated ability to regulate conduct within its own borders evidences Congress' wisdom in limiting the reach of the U.S. antitrust laws. This is the precise consideration that has led this Court to recognize that U.S. laws should be interpreted to avoid that conflict. Because European and other countries have fashioned comprehensive antitrust regimes, extending the reach of U.S. antitrust law infringes the sovereign prerogatives of foreign nations to regulate their own markets according to their own laws and policies.

As this Court recognized in *Hoffman-LaRoche*, the prospect of parallel antitrust enforcement actions invites the potential for interference with the sovereign prerogatives of foreign governments. This Court rejected the proposition that "the practical likelihood of interference with the relevant interests of other nations is minimal," recognizing that the Court has already heard cases "to the contrary," *Hoffman-LaRoche*, 124 S. Ct. at 2368, such as *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 797-99 (1993), where "the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy," *Hoffman-LaRoche*, 124 S. Ct. at 2368; *see also* 2 W. Fugate, *Foreign Commerce and the Antitrust Laws* § 16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints)

Likewise, "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies." *Hoffman-LaRoche*, 124 S. Ct. at 2368. "The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy." *Id.* Similarly here, the United States has chosen to bring a criminal prosecution against the petitioners and the country has arrested Gosselin's chief executive, a Belgian citizen, when he traveled to a conference in the United States. By contrast, the German proceeding is conducted by an

administrative agency, and it is a quasi-punitive process, without the stigma of criminal liability or the prospect of imprisonment for any charged individuals.

The Fourth Circuit decision not only creates the prospect for interference with German policy in this case, but if left undisturbed, invites conflict in future antitrust cases. The Fourth Circuit's determination to construe antitrust exemptions "narrowly," and to ignore the principle of prescriptive comity, invites a similar construction of other antitrust exemptions in future cases. In order to reaffirm *Hoffman-LaRoche* and prevent future interference, certiorari is warranted.

D. The Court Should Also Grant Review On The Fraud Count In The Indictment, Because This Claim Falls With The Antitrust Charge.

The petition for certiorari should be granted as to the entire case so that the judgment may be vacated with respect to the second charge in the indictment: the charge that petitioners engaged in a conspiracy to defraud. *See* 18 U.S.C. § 371. The indictment alleges no separate theory of fraud in this case. The Statement of Facts says, summarily, that petitioners "did unlawfully, willfully and knowingly combine, conspire and agree to defraud the United States by increasing the rates paid by DOD for the transportation of military household goods." App. 67a. If petitioners' conduct was protected by Shipping Act antitrust immunity, then there is no unlawful conduct alleged in this case, because there is no allegation of any separate fraudulent or misleading statements made by the petitioners. Thus, it is impossible to understand the conduct on which any charge of fraud could be based.

The Fourth Circuit, holding that there was no immunity, did not address this issue. *See* App. 20a-21a. In order to ensure that this issue is preserved after any remand of the case, the grant of certiorari should include this dependent

issue as well, so that, at the least, it would be available for decision by the Fourth Circuit after this Court's disposition of the other issues in the case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

CONTENTS

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES of America,
Plaintiff-Appellant,
v.
GOSSELIN WORLD WIDE MOVING, N.V.;
The Pasha Group,
Defendants-Appellees.

United States of America,
Plaintiff-Appellee,
v.
Gosselin World Wide Moving, N.V.,
Defendant-Appellant,
and
The Pasha Group,
Defendant.

United States of America,
Plaintiff-Appellee,
v.
The Pasha Group,
Defendant-Appellant,
and
Gosselin World Wide Moving, N.V.,
Defendant.

Nos. 04-4752, 04-4876, 04-4877.

Argued March 18, 2005
Decided June 14, 2005

Before WILKINSON and GREGORY, Circuit Judges, and FREDERICK P. STAMP, JR., United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded for resentencing by published opinion. Judge WILKINSON wrote the opinion, in which Judge GREGORY and Judge STAMP joined.

OPINION

WILKINSON, Circuit Judge.

In this case, we must decide whether defendants are criminally liable for a scheme that raised the prices the Department of Defense ("DOD") pays to transport its personnel's belongings overseas. Defendants have admitted to orchestrating this scheme and have agreed to accept liability under the Sherman Act, 15 U.S.C. § 1 (2000), and the federal anti-fraud statute, 18 U.S.C. § 371 (2000), if we determine that their behavior is not immune from such liability under the Shipping Act, 46 U.S.C. app. §§ 1701-1719 (2000). We hold that the Shipping Act's immunity provisions afford defendants no relief from liability for the antitrust violation and conspiracy to defraud they have admitted. We therefore affirm in part, reverse in part, and remand for resentencing.

I.

A.

When personnel of the DOD are posted to foreign countries, the International Through Government Bill of Lading program ("ITGBL") covers their moving expenses. The DOD contracts with private companies to provide this service. Under the Military Traffic Management Command

("MTMC"), bids are solicited for "through rates" from U.S. freight forwarding companies. A through rate is a payment encompassing all the costs involved in a door-to-door move of DOD personnel's household effects. Bidding for through rates occurs biannually and involves a two step process.

In the first step, or "initial filing," the freight forwarders file a bid for a through rate associated with a particular route, or channel. The low bid that emerges is referred to as the "prime through rate." MTMC publishes this bid and the next four lowest bids. The company that bids the prime is entitled to a set percentage of DOD freight business for the associated channel.

In the second step, other freight forwarders resubmit bids in light of the published prime. The remaining companies may match, or "me-too," the prime for each channel, or they may bid a higher rate. When the channel at issue operates in a competitive market, a forwarder must typically me-too the prime to receive any DOD business. Forwarders that me-too the prime are also entitled to a set portion of DOD business for the cycle and channel for which they have bid.

Because through rates are unitary, they encompass many costs, all of which the U.S. forwarders become responsible for when the DOD accepts their bids. Some of these costs relate to moving services undertaken by other firms along the channel. Costs of this sort cover five general categories of service: the carriage of goods between inland U.S. cities and U.S. ports, services performed at U.S. ports, ocean transportation between U.S. and foreign ports, foreign port services, and carriage of goods between foreign ports and foreign inland points. U.S. freight forwarders must naturally consider these costs in setting their bids.

B.

Defendant Gosselin World Wide Moving N.V. ("Gosselin"), a Belgian corporation, and defendant The Pasha Group ("Pasha"), a U.S. corporation, operate in the channels between the United States and Germany. Both companies provide a package covering local German moving agent services, European port services, and ocean transport services in this market. Defendants thus deal with goods shipments between German points of origin (the households of DOD personnel abroad) and U.S. ports of destination. Gosselin and Pasha offer a "landed rate," which is a fee that covers all the moving costs involved in the portion of the channels they service.

Defendants also act as the exclusive agents of the International Shippers' Association ("ISA"), a conference of freight forwarders organized to negotiate collectively with shippers operating in the through transportation market. Many of the U.S. freight forwarders who place bids in the MTMC are also ISA members. In their capacity as ISA agents, Gosselin and Pasha negotiate service contracts with the Trans Atlantic American Flag Line Operators ("TAAFLO"), a group of U.S. ocean carriers. TAAFLO's service contract with the ISA entitles all ISA members to ocean transportation with TAAFLO member-carriers at a predetermined rate.

In late 2001, initial filings for the summer bidding cycle of 2002 occurred. A U.S. freight forwarder ("FF1") filed prime through rates with the MTMC for twenty-six of the channels between Germany and the U.S. FF1 did not use the landed rate offered by either defendant. Instead, by negotiating separately with each service provider at every step of the transportation chain, FF1 was able to undercut its competitors by three dollars per hundredweight in twelve of the twenty-six channels. In December 2001, DOD published

FF1's prime bid along with the next four lowest. The remaining forwarders then had until January 12, 2002 to file their second round bids.

Gosselin was evidently alarmed that FF1 had been able to low-bid for the twelve channels without using Gosselin's landed rate. Later in December, Gosselin's managing director sent an email to another landed rate provider, inviting the provider to collude with Gosselin to prevent the me-too rates for the twelve routes at issue from converging to the prime. Such convergence was likely, as we have noted, because of the competitiveness of the US-Germany through transportation market. The Gosselin managing director observed that by "not taking [FF1's bid] into consideration we would increase the rate level with an average of [\$3.63]." The director opined that "[t]his is the only thing that in my mind can happen." In a reply email sent the same day, an executive at the competitor concurred, noting that "if we do not react and give [the] industry a clear message which rate to base the [me-too bids] on, then everyone will use the low rate and later expect us to reduce our rates so those carriers can work under their [me-too] rates."

Shortly after this exchange, Gosselin's managing director forwarded the emails to the president of Pasha. The Gosselin executive identified the twelve channels, which had "quite some money on the table," and inquired "what rate levels would you be able to support if those [channels] would go to second level?" The director stressed that "it is important we [ ] move rather quickly now." Pasha later indicated its willingness to cooperate.

Defendants faced a difficult task in preventing the imminent me-too bids from converging to the prime. FF1 had already demonstrated that defendants' landed rates could be undercut by contracting separately for each transportation

segment along the twelve channels. Defendants therefore had to take preemptive action to prevent the remaining U.S. forwarders from following FF1's lead. In early January 2002, the managing director of Gosselin agreed in writing to pay twelve of the largest German moving agents a specified fee. The German agents, for their part, agreed not to handle business from freight forwarders in those channels unless the forwarders submitted me-too bids at the second lowest level (the "second low") or above. Gosselin thereafter arranged a telefax to U.S. freight forwarders who were finalizing their second-step bids advising them of the German agents' undertaking.

Not content with securing their share of the DOD business designated for the second-round bids, defendants set about eliminating FF1's prime rate in the twelve channels at issue. First, they persuaded FF1 to cancel its bid with the MTMC if the remaining freight forwarders would file second-step bids at or above the second-low level. Defendants then secured such an agreement from the remaining forwarders. The forwarders overwhelmingly honored this agreement, and those who strayed below the second-low level were persuaded to withdraw their competitive bids.

As a result of defendants' scheme, a good deal of household goods shipments during the 2002 summer cycle in the twelve channels occurred at or above the second-low rate. The net financial effect of the conspiracy was to cause the DOD to pay substantially more than if FF1's original prime rate had prevailed.

C.

The Department of Justice ("DOJ") charged defendants by information with two counts. The first count alleged a conspiracy to restrain trade in violation of the

Sherman Act. 15 U.S.C. § 1 (2000). The second count alleged a conspiracy to defraud the United States under 18 U.S.C. § 371 (2000).

Defendants agreed to conditional pleas. They stipulated to a statement of facts on the basis of which they would move the district court to dismiss both counts. Gosselin and Pasha agreed in their pleas to make only one argument in support of their motion to dismiss: that the conduct set forth in the statement of facts "is immune from prosecution under the [Shipping Act.]" If the district court found such immunity with respect to "both counts," and this finding was affirmed on appeal, defendants would not enter a guilty plea. If the district court denied the motion "as to either or both counts," however, the defendant would plead guilty on the "remaining counts" subject to withdrawal if a higher court overturned the district court's finding. The plea agreements also indicated that the parties would recommend to the district court specified sentences in the form of financial penalties depending on which count or counts survived the motion to dismiss.

Pursuant to the plea agreement, defendants filed a motion to dismiss on the basis of immunity under the Shipping Act, 46 U.S.C. app. §§ 1701-1719 (2000). The district court granted the motion with respect to the antitrust count, but denied it with respect to the conspiracy to defraud count. Following the arrangement set out in the plea agreements, Gosselin and Pasha pled guilty to the conspiracy to defraud count. Again pursuant to the pleas, the district court imposed on each defendant a criminal fine of $4.6 million. After the final sentencing order, the DOJ appealed the dismissal on immunity grounds of the antitrust count and defendants cross-appealed their convictions on the conspiracy to defraud count. We now address these appeals, beginning with the issue of immunity under the Shipping Act.

II.

Defendants' collusion with each other and with other firms operating in the twelve transportation channels clearly violated the Sherman Act's injunction on combinations "in restraint of trade." 15 U.S.C. § 1 (2000). "It has been held too often to require elaboration [ ] that price fixing is contrary to the policy of competition underlying the Sherman Act...." *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309 (1956). Defendants' scheme, which prevented second round bids from converging to the prime and even erased FF1's first round prime bid, amounted to naked bid rigging. And "bid rigging agreement is price fixing agreement of the simplest kind." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 318 (4th Cir.1982) (quoting *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir.1970)); *see also United States v. W.F. Brinkley & Son Const. Co., Inc.*, 783 F.2d 1157, 1160 (4th Cir.1986). Criminal antitrust liability is therefore appropriate unless defendants enjoy immunity under another federal law.

The Supreme Court has consistently construed the reach of exemptions from antitrust laws narrowly, even when Congress confers these exemptions in terms. *See, e.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). This narrow construction of antitrust immunity is appropriate because the robust marketplace competition that antitrust laws protect is a "fundamental national economic policy." *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). This canon of construction has been employed by the Supreme Court to defeat antitrust exemptions claimed under provisions of the McCarran-Ferguson Act, *see Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979), the Miller-Tydings and McGuire Acts, *see McKesson*, 351 U.S. at 316, and the

Agricultural Marketing Agreement Act, *see United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939).

Defendants here claim exemption from antitrust law under a federal maritime statute, the Shipping Act of 1984. 46 U.S.C. app. §§ 1701-1719 (2000). The Act modified an earlier law enacted in 1916. *See* 46 U.S.C. app. §§ 801-842 (1982). The earlier enactment grew out of the difficulties faced by the U.S. shipping industry in the early part of the last century. *See generally Puerto Rico Ports Auth. v. FMC*, 919 F.2d 799, 806-807 (1st Cir. 1990); *Plaquemines Port, Harbor and Terminal Dist. v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir.1988). To set U.S. shippers on an equal footing with foreign competitors, who operated outside of U.S. antitrust strictures, Congress granted them limited antitrust immunity. *See* 46 U.S.C. app. § 814 (1982).

This immunity, however, came with regulatory strings attached. *See id.* § 804. The regulatory requirements of the 1916 Act were designed to prevent the maritime transportation industry from monopolistically abusing its newly conferred grant of immunity. *See Puerto Rico Ports*, 919 F.2d at 807. Regulation under the 1916 Act thus preserved some anti-competitive prohibitions. *See id.*; *A & E Pacific Const. Co. v. Saipan Stevedore Co., Inc.*, 888 F.2d 68, 71 (9th Cir.1989); *Plaquemines*, 838 F.2d at 542-43. Nonetheless, regulated firms did enjoy the real benefit of operating outside the full strictures of federal antitrust laws. Mindful of this benefit, the Supreme Court concluded that the traditional canon of narrow construction, applicable to antitrust exemptions generally, applied with full force to the coverage provisions of the 1916 Act. *See FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-33 (1973); *Carnation*, 383 U.S. at 217-218.

The 1916 Act was supplemented by the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719 (2000). Although the

1984 Act contained several new grants of antitrust immunity, *see id.* § 1706(a), nowhere in the 1984 Act did Congress indicate an intention to override the principle of narrow construction for antitrust exemptions that the Supreme Court had long applied to the 1916 Act. Moreover, this interpretive maxim has informed the construction of every other grant of antitrust immunity in federal legislation. We therefore see no reason to depart from ordinary practice in construing the 1984 Act.

III.

With the foregoing interpretive framework in mind, we turn to defendants' particular contentions. The district court found antitrust immunity for Gosselin and Pasha in three distinct statutory provisions of the Shipping Act. We address immunity under each statutory provision separately.[1]

A.

Defendants first claim immunity under 46 U.S.C. app. § 1706(a)(4) (2000), which exempts from antitrust liability "any agreement or activity concerning the foreign land segment of through transportation that is part of transportation provided in a United States import or export trade."

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[1] Defendants note that when parties enter into a conditional plea agreement designed to permit defendants to challenge the prosecution theory on a particular basis, any ambiguities in the stipulated facts must be resolved in defendants' favor and the government may not rely in its prosecution on facts beyond those stipulated. *See United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). Accordingly, in resolving the contentions that defendants press on appeal, we take care not to rely on allegations that were not admitted in the plea agreements and the incorporated statement of facts.

Defendants argue that this provision covers all aspects of their scheme to rig bids. The first step in this scheme, defendants emphasize, was the agreement with twelve large German local agents to handle no business from forwarders who filed bids below the second low level. This agreement, defendants claim, is covered by § 1706(a)(4) because the German agents provide only services between German ports and destinations in the interior--a "foreign inland segment." Gosselin and Pasha had market leverage only in this segment; in the other segment they service, ocean transportation, they were constrained by their status as ISA agents and the strict terms of the TAAFLO service contract. Thus the success of the remainder of their scheme depended entirely on the continued viability of the arrangement defendants had reached with the local German firms. For this reason, defendants conclude, the scheme in its entirety should be covered by the immunity provision of § 1706(a)(4).

We do not believe that the statutory exemption extends as far as Gosselin and Pasha would have it. To begin with, the statutory language does not support defendants' position. For an agreement or activity to "[concern] the foreign inland segment," § 1706(a)(4) (emphasis added), as the statute requires, the parties undertaking the agreement or participating in the activity must have in mind some consequence for the foreign inland segment that they intend their behavior to have. *Accord Hileman v. Pittsburgh & Lake Erie Props., Inc.*, 290 F.3d 516, 519 (3d Cir. 2002) (" '[C]oncerning' ... is essentially a connecting term, the scope and meaning of which is defined in part by the terms it modifies."); *Commerford v. Thompson*, 1 F. 417, 420 (C.C.D. Ky. 1880) (observing that the "broadest sense" of the term " 'concerning' " is " 'pertaining to or relative to' "). Because defendants' collusive effort was aimed at the entire through transportation market, rather than just the foreign inland segment, we do not think that they can claim exemption from antitrust liability under § 1706(a)(4). Indeed, defendants

fixed bids for through transportation rates, *i.e.* door-to-door rates, not just rates for the "foreign inland segment" of the routes. § 1706(a)(4).

It is true that defendants' original agreement with the German local agents may have had the relationship to a "foreign inland segment" that the statute requires. *Id.* Indeed, *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999), the case upon which Gosselin and Pasha chiefly rely, awarded immunity under the Shipping Act. In *Tucor*, several Philippine firms, operating in a through transportation market "packed, picked up, and trucked household shipments [of U.S. military personnel] from Subic Naval Base and Clark Air Force Base ... to a Philippine seaport." 189 F.3d at 836. The firms were indicted under the Sherman Act for conspiring amongst each other "to suppress competition by fixing prices." *Tucor*, 35 F. Supp. 2d at 1175. Defendants pled guilty, but the district court later dismissed the indictments on the basis of immunity under § 1706(a)(4). The Ninth Circuit affirmed, finding that § 1706(a)(4)'s reference to a "foreign inland segment," "unambiguously exempts the activities of [defendants]," *Tucor*, 189 F.3d at 836, occurring as they did between points "entirely within a foreign country." *Id.* at 835.

There is an argument to be made that the agreement defendants made with the local German firms fits under the immunity announced in *Tucor*. And if defendants' scheme had ended there, we would have to decide whether the agreement did so qualify and whether *Tucor* should be adopted in this circuit. But the scheme did not stop there. Rather, Gosselin and Pasha took additional steps to perfect their bid-rigging plan. And we are not persuaded that these additional steps "[concerned] the foreign inland segment," in the manner the statute requires. § 1706(a)(4).

Gosselin and Pasha's contacts with FF1, for instance, related not to foreign inland services, but to defendants' desire that FF1 withdraw the prime through rate bid it had filed with MTMC. Similarly, the agreement defendants secured from other U.S. freight forwarders to file bids at or above the second low level had little to do with the German inland segment of the through services these forwarders offered. Rather, the agreement was a precommitment mechanism to ensure that none of the freight forwarders defected from the anticompetitive cartel that defendants were assembling. When some of these forwarders later broke ranks, defendants instituted measures to reign them in. But these measures were designed only to secure withdrawal of the competitive through rate bids the forwarders had filed in the second round, not to have consequences for the foreign inland segment.

In short, none of the additional steps Gosselin and Pasha took beyond their agreement with the German local agents had intended effects for any aspect of the German inland part of the through transportation market. It is unclear, therefore, how these steps "[concerned]" this foreign inland segment, as they must for immunity to attach under § 1706(a)(4).

Moreover, a broad immunity of the sort that Gosselin and Pasha seek would threaten to excise antitrust liability from the through transportation market completely. If § 1706(a)(4) exempted from anti-trust all stages of a conspiracy that involves in some manner a foreign inland segment, then any firm operating in any segment of any through transportation channel need only execute an agreement with a local moving agent to shield itself from the antitrust laws entirely. It does not take much to imagine how sophisticated transportation firms, intent on reaping larger gains, might abuse the immunity of such a rule. The incentives for opportunistic associations with companies operating in foreign inland

segments would simply be too great. And without the constraint of anticipated antitrust liability, the prices charged by companies in the through transportation market would escalate. Further, the agreements and activity for which defendants seek immunity here were not regulated by the FMC. Lack of regulatory oversight might only exacerbate the upward pressure on prices for through transportation engendered by the absence of antitrust liability.

The upshot of defendants' interpretation of § 1706(a)(4) would therefore be a through transportation market beset with collusive and artificially inflated bids, detrimental to consumers and non-cooperating competitors alike. The government, as a repeat purchaser, would stand to lose much, and the extra money it would have to pay would come from the fisc and thus taxpayers.

It is unlikely that Congress intended such dismaying effects, but if there is any doubt over whether § 1706(a)(4) affords defendants relief, it is settled by the maxim that exceptions to the antitrust laws should be construed narrowly. *See Seatrain*, 411 U.S. at 732-33. The Supreme Court has relied on this principle to render agreements subject to the antitrust laws rather than the lesser anticompetitive protections of FMC regulation. *See id.* Here defendants seek exemption from legal enforcement by the DOJ for agreements that have not been regulated by the FMC. We hold for reasons earlier expressed that § 1706(a)(4) does not immunize defendants' scheme to raise through rate bids in the twelve channels at issue.

B.

Defendants next claim immunity under § 1706(a)(2). That section exempts from antitrust laws

> any activity or agreement within the scope of this chapter ... undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the [FMC] and in effect when the activity took place, or (B) it is exempt[ed by the FMC under § 1715] from any filing or publication requirement of this chapter.

Defendants do not claim that their "activity or agreement[s]" were undertaken "pursuant to an agreement on file with the" FMC. Rather, they point to a tariff filing exemption that the FMC granted to non-vessel operating common carriers, like defendants, for the "[t]ransportation of used military household goods and personal effects by ocean transportation intermediaries." 46 C.F.R. § 520.13(c) (2004). Gosselin and Pasha argue that they reasonably believed their collusive "activit[ies] and agreement[s]" to be exempt from the filing requirements of the Shipping Act under this regulation, and thus beyond the antitrust laws under § 1706(a)(2)(B).

The touchstone of § 1706(a)(2)(B) is reasonableness. Yet the terms of the exemption on which defendants rely, and other features of the regulatory framework in which defendants operate, demonstrate that their reliance was, if anything, unreasonable.

To begin with, the exemption facially covers only "tariffs," *see* 46 C.F.R. § 520.1(a) (2004), not the kind of agreements and activities involved in defendants' bid rigging scheme. Yet a distinction between tariffs on the one hand and operating agreements on the other pervades the Shipping Act. Compare § 1703(a) (cataloguing the "agreements by or among ocean common carriers" to which the "chapter applies," including agreements to "discuss, fix, or regulate transportation rates"), with § 1707 (describing "tariffs" that "each common carrier and conference shall keep open to public inspection"). This statutory distinction makes

implausible defendants' claim that they understood the reference to tariffs in the exemption to cover the collusive agreements they secured during the course of their scheme.[2]

The terms of § 1715, the Shipping Act provision mentioned in § 1706(a)(2)(B) which governs the FMC's exemption procedures, further erodes Gosselin and Pasha's claim of immunity under § 1706(a)(2)(B). Section 1715 conditions exemption from the disclosure requirements of the Act on a finding by the FMC "that the exemption will not result in substantial reduction in competition or be detrimental to commerce." The FMC was thus required to make such a finding before passing the tariff filing dispensation on which defendants claim to have relied.

Section 1715 is quite clear in laying out the criteria for the granting of filing exemptions: no "substantial reduction in competition" nor a "[detriment] to commerce" may result from the exemption. The agreements that defendants secured during their bid rigging scheme, however, accomplished just those ends: indeed, it was precisely by a

[2] Indeed, it would appear that the reach of the immunity in § 1706(a)(2)(B) is not as broad as defendants assume. Gosselin and Pasha focus on the tariff disclosure dispensation they received, but the statutory provision clearly requires a reasonable belief in an exemption from "any filing or publication requirement of" the Shipping Act. § 1706(a)(2)(B) (emphasis added). Section 1706(a)(2)(B) thus refers not only to § 1707--the tariff disclosure provision--but also § 1704, which governs disclosure of "agreement[s]." And § 1704(a), by its terms, extends to agreements that "control, regulate, or prevent competition in international ocean transportation." § 1703(a)(6). The agreements secured during the course of defendants' scheme would qualify under this definition, making them subject to a "filing or publication requirement of" the Act under § 1706(a)(2)(B). But if this is so, defendants' would hardly have a "reasonable basis to conclude that" their "activity or agreement[s]" were exempt from "any " disclosure provision of the statute, as they must to be immunized under § 1706(a)(2)(B).

"reduction in competition" that Gosselin and Pasha succeeded in inflating bids above the prime level, and this result was clearly "[detrimental] to commerce." The incongruence between the conditions that § 1715 sets forth and the effects of defendants' bid-rigging scheme erodes defendants' claim that they reasonably understood the tariff filing exemption to permit such activity.

Pasha and Gosselin complain that the ex ante judgment of the FMC under § 1715 should not apply ex post to our interpretation of the reasonableness standard under § 1706(a)(2)(B). But the statutory phrase "with a reasonable basis to conclude," § 1706(a)(2), clearly contemplates an inquiry into the propriety of a party's belief in light of the circumstances. And one of those circumstances is surely the terms of the statute governing the exemption. As sophisticated businesses operating in a regulatory regime, defendants are properly charged with knowledge of the statute that applies to their behavior. *Accord Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989) (citing *Kansas Power & Light Co. v. Burlington Northern R. Co.*, 544 F. Supp. 1336, 1347 (D. Kan. 1982)) (indicating that "specialized knowledge" including of "statutory ... law" may properly be presumed of parties according to their "experience"). Thus aware of the criteria set forth in § 1715, Gosselin and Pasha can hardly claim a "reasonable basis to conclude that" their behavior was covered by the tariff filing exemption. § 1706(a)(2). An exemption conditioned upon no "substantial reduction in competition" simply should not be read to sanction, in any manner, behavior intended to accomplish just such a reduction. § 1715.

Moreover, defendants' position flies once again in the face of the maxim that exceptions to antitrust liability should be narrowly construed. Gosselin and Pasha's claim that the scope of the tariff filing exemption somehow applies to the

stark anticompetitive agreements here is simply not persuasive. Section 1706(a)(2)(B) may well extend to behavior taken pursuant to an FMC filing or exemption whose anti-competitive effects are inadvertent, tangential, or debatable. But when, as here, the anticompetitive effects are intentional, direct, and palpable, reading § 1706(a)(2)(B) to insulate these effects from liability would encourage gross violations of the antitrust laws and vitiate the canon of construction that aims to protect the operation of these laws.

For the foregoing reasons, we do not believe that Congress intended § 1706(a)(2)(B) to confer immunity on the kind of conduct for which defendants are being prosecuted. We therefore find that defendants' scheme to rig bids is not exempt from antitrust under § 1706(a)(2)(B).

C.

The final part of the Shipping Act under which defendants claim immunity is § 1706(c)(1). This provision states that "[a]ny determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in [§ 1706(a)] shall not remove or alter the antitrust immunity for the period before the determination." Defendants contend that an adverse decision on one of the two other statutory immunities they seek-- § 1706(a)(4) and § 1706(a)(2)(B)--constitutes a "denial or removal," and that § 1706(c)(1) thus requires that any penalty be imposed only prospectively.

Section 1706(c)(1) was designed for those instances in which a firm has been operating under a clearly established statutory immunity, whose validity or scope is subsequently called into doubt--for instance because of a changed circumstance or because of some discrete action on the part of the firm that the statute prohibits. *See, e.g.,* § 1709 (listing a variety of prohibited actions for firms operating

under filed tariffs or agreements). When such an event occurs and immunity is abrogated, § 1706(c)(1) ensures that subsequent legal or administrative proceedings will not impose liability for the period between the event and the proceedings. The provision thus affords the regulated firm some time to re-engage the administrative process or otherwise render itself compliant. Under this interpretation, § 1706(c)(1) promotes beneficial reliance by the regulated industry on the regulatory process, particularly when the event that abrogates immunity is the invalidation of a filed tariff or operating agreement. Congress was evidently mindful of this end in passing this provision. *See, e.g.*, H.R. Rep. No. 98-53, pt. 1, at 33 (1983) ("[Section 1706(c)] is needed to provide a degree of stability and certainty to an agreement filed in good faith and valid on its face.")

To qualify for relief under § 1706(c)(1), defendants must therefore identify a discrete event that triggers the provision's grace period. Obviously, that event cannot be our present denial of immunity under another statutory provision of the Shipping Act, as defendants would have it. Were we to countenance such an argument, a maritime firm wishing to avoid full antitrust liability would simply invent a series of spurious immunity arguments and remain perpetually one step ahead of the judicial or administrative proceedings invalidating them. Such a state of affairs would be the antithesis of the antitrust protections that the maxim requiring narrow construction of exemptions therefrom contemplates. *See Seatrain*, 411 U.S. at 732-33. We therefore reject defendants' interpretation of § 1706(c)(1).

D.

In short, we hold that defendants' scheme to rig bids does not qualify for immunity under any of the three provisions Gosselin and Pasha rely on-- § 1706(a)(4), §

1706(a)(2), and § 1706(c)(1).[3] We therefore conclude that defendants enjoy no immunity from antitrust prosecution under the Shipping Act.[4]

IV.

The charging information also contained a conspiracy to defraud count. *See* 18 U.S.C. § 371 (2000). Defendants argued in their motion to dismiss that the immunity provisions of the Shipping Act were broad enough to insulate them from liability under a conspiracy to defraud theory. Despite the district court's conclusion that defendants were indeed immunized from antitrust liability by the Shipping Act, the court found that this immunity did not extend to conspiracy to defraud. Employing the test set forth in

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[3] Because we reach this conclusion on the substance of defendants' immunity arguments, we need not address the government's alternative contention that the agreements for which Gosselin and Pasha seek immunity are beyond the coverage provisions of the Shipping Act and likewise beyond the FMC's jurisdiction. *See* § 1703; *see also Tucor*, 189 F.3d at 837 (discussing a similar argument made in that case).

[4] One of the factors on which the district court rested its contrary determination was the "rule of lenity." Under this principle of interpretation, the application of ambiguous criminal statutes should be resolved in favor of a defendant. *See, e.g.*, *Rewis v. United States*, 401 U.S. 808, 812 (1971). The Supreme Court has counseled, however, that there must be a "genuine ambiguity" before lenity will apply, *Perrin v. United States*, 444 U.S. 37, 49 n. 13 (1979), and has warned that no such ambiguity exists when "the ambiguous reading relied on is an implausible reading of the congressional purpose." *Caron v. United States*, 524 U.S. 308, 316 (1998). The Court has also directed that "traditional tools of statutory construction" should be consulted before ambiguity is found. *Id.* (citing *United States v. Shabani*, 513 U.S. 10, 17 (1994)). Finding, as we do, that such "traditional tools," including "congressional purpose" and ordinary canons of statutory construction, suffice to resolve the interpretive issues before us, we see no occasion for resort to the rule of lenity.

Blockburger v. United States, 284 U.S. 299 (1932), the district court further determined that the elements of the antitrust claim did not subsume those of the conspiracy to defraud claim. The district court thus concluded that defendants could properly be prosecuted for the same behavior under both counts. *See United States v. Ashley Transfer & Storage Co., Inc.*, 858 F.2d 221, 224-25 (4th Cir. 1988) (finding that conduct may form basis for prosecution under § 371 following acquittal on Sherman Act count). As a result, the court rejected defendants' motion to dismiss the fraud count on Shipping Act immunity grounds, and, following the terms of the plea agreements, Gosselin and Pasha pled guilty under § 371.

We have concluded that defendants enjoy no antitrust immunity under the Shipping Act. We therefore need not determine, as the district court did, whether immunity under the Shipping Act extends to anticompetitive behavior that is also actionable under a conspiracy to defraud theory. Furthermore, defendants concede on appeal that the district court's Blockburger analysis is "certainly correct" and that "simultaneous Sherman Act and Section 371 prosecutions are not multiplicitous." Prosecution of defendants' particular course of action under both statutes is therefore permissible.

In reviewing the district court's disposition of the conspiracy to defraud counts, it remains only to address the contention, raised on appeal, that there is insufficient factual support in the plea agreements and incorporated statement of facts for an adjudication of guilt under § 371.

Challenges to the factual basis for an adjudication of guilt following a guilty plea are severely circumscribed. "A voluntary and intelligent plea of guilty is an admission of all the elements of a formal criminal charge." *United States v. Willis*, 992 F.2d 489, 490 (4th Cir. 1993) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). A defendant

who pleads guilty therefore "admits all of the factual allegations made in the indictment," *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir. 1988) (*per curiam*), and waives "all non- jurisdictional defects, including the right to contest the factual merits of the charges." *Willis*, 992 F.2d at 490 (internal citations omitted); *see also United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990). In these circumstances, courts have permitted a defendant to challenge an adjudication of guilt only with the argument that "the facts underlying the charge" are insufficient "to constitute a crime." *Stanback v. United States*, 113 F.3d 651, 654 (7th Cir. 1997).

The most that Gosselin and Pasha may argue, therefore, is that the allegations in the plea agreements and the incorporated statement of facts are so insubstantial that they could not constitute an offense under § 371. It is clear that the factual recitations in the plea documents easily surmount this low hurdle. Conspiracy to defraud under § 371 requires three elements: "(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objectives, and (3) an intent on the part of the conspirators to agree as well as to defraud the United States." *United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986). The statute covers "not only conspiracies intended to involve the loss of government funds but also any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Id.* The statement of facts laid out in some detail the course of defendants' conspiracy, including the discrete agreements Gosselin and Pasha secured with various firms engaged in the bidding cycle. The statement of facts also unequivocally recites that the foregoing actions "[increased] the rates paid by DOD for the transportation of military goods during the [cycle] to levels higher than would have prevailed in the absence of their conspiracy." The stipulation therefore contains an abundance of information to establish a

conspiracy to "[impair] ... the lawful function of [a] department of government," id.--namely the MTMC program.

V.

The final contention that Gosselin and Pasha raise on appeal concerns their sentence. Following the adjudication of guilt on the conspiracy to defraud count, the district court considered the sentences that the parties had agreed to recommend in the event of this outcome. The district court settled on the figure recommended in the plea agreements--a fine of $4.6 million for each defendant for its part in the conspiracy to defraud. Gosselin and Pasha now argue that this fine exceeded the maximum permissible under the relevant sentencing statute, 18 U.S.C. § 3571 (2000). They assert that the "gross loss" to the government as a result of the conspiracy to defraud was only $1 million, *id.* § 3571(d), less than the $2.3 million amount on which the plea agreements' sentencing recommendations for the § 371 count were predicated.

The sentencing arrangement that the parties agreed to is carefully set out in each plea document. In the event of an adjudication of guilt, "the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly, that the Court impose a sentence requiring the defendant to pay to the United States a criminal fine...." The agreements further provide that "Count 1 and Count 2 are [to be] grouped together" for sentencing purposes, "and thus, the total fine paid will be the greater of" two figures that each sentencing agreement recites. The first figure is derived by applying various listed Sentencing Guidelines factors to the penalty provisions governing Sherman Act violations. The second figure is derived by applying various listed Sentencing Guidelines factors to the penalty provisions governing § 371 violations.

Operating under the assumption that defendants were guilty only of conspiracy to defraud, the district court limited its attention during sentencing to the conspiracy to defraud part of each plea agreement's sentencing recommendation. We have found additionally that the Shipping Act affords defendants no immunity from the antitrust count. We therefore vacate the sentence and remand for resentencing in light of our immunity holding and the entirety of each plea agreement's sentencing provisions.

VI.

We have found that the three immunity provisions of the Shipping Act under which Gosselin and Pasha claim antitrust immunity afford them no relief. We have also determined that there was no error in the district court's adjudication of guilt on the conspiracy to defraud count. Because the district court applied the sentencing provisions of the plea agreement under the assumption that defendants were only guilty of conspiracy to defraud, a remand for resentencing in light of our disposition of the antitrust issue is in order. The judgment of the district court is therefore

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF VIRGINIA,
Alexandria Division

UNITED STATES of America,
v.
GOSSELIN WORLD WIDE MOVING N.V. and The Pasha Group, Defendants.
No. 1:03cr551 (GBL).
Aug. 16, 2004.

MEMORANDUM OPINION

LEE, District Judge.

THIS MATTER is before the Court on Defendant Gosselin World Wide Moving N.V.'s ("Gosselin") Motion to Dismiss the Information for Failure to State an Offense, and Defendant Pasha Group's ("Pasha") Motion to Dismiss Criminal Information. This is a criminal case, which arises out of Defendants' alleged antitrust violations. The Government alleges that Defendants violated 15 U.S.C. § 1, conspiracy to restrain trade (Count I), and 18 U.S.C. § 371, conspiracy to defraud the United States (Count II). Both Gosselin and Pasha have entered into a plea agreement with the Government, conditioned upon the outcome of the Court's ruling on these motions.

Five issues exist before this Court. First, whether Defendants alleged conduct falls within an exception to the antitrust laws as specified in Section 1706(a)(4) (codified at 46 U.S.C. app. § 1706(a)(4)) of the Shipping Act of 1984 ("Shipping Act"). Second, whether the language of Section 1706(a)(4) of the Shipping Act is so ambiguous as to warrant the Court's application of the rule of lenity, mandating dismissal of the criminal information. Third, independent of the issues raised by Section 1706(a)(4) of the Shipping Act,

does Section 7(a)(2) (codified at 46 U.S.C. app. § 1706(a)(2)) of the Shipping Act further exempt Defendants' conduct from the antitrust laws. Fourth, if the Court finds that antitrust immunity does not apply to Defendants in this case, whether Section 7(c)(1)(codified at 46 U.S.C. app. § 1706(c)(1)) of the Shipping Act provides Defendants retroactive immunity. Fifth, does the Government state an independent basis for fraud independent of the Sherman Act violation.

The Court holds that under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does "concern" the foreign inland segment of through transportation. As such, Defendants alleged conduct is not within the purview of the antitrust laws pursuant to the Shipping Act's antitrust immunity provisions.

Second, even assuming *arguendo,* that Defendants alleged conduct was not immune from the antitrust laws under a plain reading of Section 1706(a)(4), the Court holds that as a matter of law, the statutory and common law rules of lenity mandate dismissal of the pending criminal information.

Third, the Court holds that, independent of antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Fourth, the Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants have immunity under a plain

reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

Fifth, the Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. Where the same conduct violates two different criminal statutes, the Government can prosecute and punish it under both statutes, as long as each statutory provision requires proof of a fact which the other does not. Therefore, the Court holds that Defendant Gosselin's Motion to Dismiss the Information for Failure to State an Offense is PARTIALLY GRANTED, and Defendant Pasha's Motion to Dismiss Criminal Information is PARTIALLY GRANTED. The Court DISMISSES Count One of the Criminal Information.

BACKGROUND

Basic Facts

This case arises out of an alleged antitrust "price-fixing" case that the Government has brought against two companies, Gosselin, a Belgian company headquartered in Antwerp, Belgium, and Pasha, a United States company headquartered in Corte Madera, California. Count I of the Indictment alleges conspiracy to restrain trade in violation of Title 15, United States Code, Section 1. Count II of the Indictment alleges conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371.

Gosselin and Pasha are both in the business of shipping the household goods of U.S. military personnel from their European homes to foreign ports. In November 2003, Gosselin and its Managing Director Marc Smet were indicted for violating the Sherman Act and conspiring to defraud the United States. The Government has since dismissed the Indictment against Mr. Smet. The November 2003 Indictment was superceded by a Criminal Information, which

the Government filed on February 13, 2004. The Criminal Information charged Gosselin and its alleged co-conspirator, Pasha. Defendants entered a conditional plea of guilty to the Criminal Information, in which they expressly reserved the right to file this motion to dismiss.

The International Through Government Bill of Lading Program

The alleged price fixing conspiracy revolves around the International Through Government Bill of Lading ("ITGBL") program. The Department of Defense ("DOD") pays for this program, whose purpose is to transport military and civilian personnel household goods to and from foreign countries. The ITGBL is administered by the Military Traffic Management Command ("MTMC"). MTMC solicits bids from U.S. freight forwarders (also called carriers). Freight forwarders are the companies that shoulder the ultimate responsibility for the military household goods shipment between the U.S. and foreign countries. *See* Statement of Facts at 5.

Freight forwarders subcontract with other service providers for each component of the transportation. The other service providers are (1) local foreign moving and storage companies, (2) foreign port agents, (3) ocean carriers, (4) U.S. port agents, and (5) U.S. moving and storage companies. Criminal Information ¶ 10; Statement of Facts ¶ 7. Freight forwarders obtain rate commitments from the service providers for each of the components, add their own markup, and combine these bids into what is called a "through rate." In putting together their through rates, U.S. freight forwarders must consider the costs for each of these services, plus the costs of a booking agent to monitor shipments, physical inputs, such as liftvans and warehouses, and finally, overhead and profit. The through rate is then submitted to the MTMC.

The MTMC conducts bidding twice a year for six-month cycles in a two-step bidding process. *See* Statement of Facts ¶¶ 4, 13. In the first step, or "initial filing," U.S. freight forwarders file their "through rates" in each route--called a "channel."[1] The lowest bidder in the initial filing sets what is called the "prime rate." The carrier that sets the prime rate for a channel is guaranteed a predetermined percentage of the shipments for that particular channel. A carrier may instead file an "administrative high" rate to indicate its intent not to file competitively at the initial filing stage, while reserving the right to file again at the second stage, known as the "me-too" stage. *See* Statement of Facts ¶ 15.

After the initial filing, MTMC publishes a list of the lowest five bids received by MTMC for each channel. Statement of Facts ¶ 16. During the "me-too" bidding period, carriers that did not set the "prime rate" may match, or "me-too" the lowest rate and receive a guaranteed fraction of the shipments moved on that particular channel. *Id.* Alternatively, carriers can file a rate higher than the low rate; however, MTMC will ship household goods using carriers with higher filed rates only after all carriers with lower rates on file exhaust their capacity.

Gosselin and Pasha have two roles within the ITGBL program. First, Pasha and Gosselin act as exclusive co-agents of an association of freight forwarders called the International Shippers' Association ("ISA"). Statement of Facts ¶ 10. Pasha and Gosselin negotiate a "service contract" on behalf of ISA with the Trans Atlantic American Flag Line Operators ("TAAFLO"), an immunized conference of U.S. ocean common carriers. Statement of Facts ¶¶ 9-10. ISA

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[1] Each "channel" is a route to or from a particular state and a specific foreign country. For instance, a channel originating from a U.S. military base in Germany to the servicemember's new home in Virginia would be designated "Germany-Virginia."

members receive discounted ocean rates from TAAFLO in exchange for committing to ship a specified volume of cargo over a set period of time. As compensation for acting as ISA's agents, Pasha and Gosselin receive a set commission fee. Statement of Facts ¶ 10.

Second, Pasha and Gosselin act as General/Booking Agents for many of their customers. MTMC requires each carrier to appoint a General/Booking Agent to serve as its local representative in Germany to receive bookings. Statement of Facts ¶ 7. As a General/Booking Agent, Defendants offer their customers the option to purchase ocean transportation together with foreign inland services (packing, trucking, and port services) that the Defendants procure from local foreign agents. Statement of Facts ¶ 12. Defendants then bill the carriers the rate fixed by the ISA-TAAFLO service contract for ocean transportation (which includes Defendants set commission) plus the rate for the foreign inland services. *Id.* This combined rate is referred to as the "landed rate." *Id.* A "landed rate" is essentially an offer to obtain foreign inland services for the carrier and then to bill those services together with the ISA-TAAFLO service contract rate for the ocean shipping. *Id.*

The Alleged Price Fixing Conspiracy

The Government states that in the initial filing for the summer of 2002 (which occurred in 2001), a U.S. freight forwarder (or carrier--referred to hereinafter as "FF-1") filed the prime rate in 26 of 52 channels from Germany to the United States. Statement of Facts ¶ 18. FF-1 did not use the landed rate of either Defendant. *Id.* In 12 of these 26 channels, FF-1's through rates were at least $3.00 per hundredweight lower than those carriers using Defendants' landed rates. *Id.* In December 2001, MTMC published FF-1's bids, along with those of the next four lowest bidders. U.S.

carriers then had until January 16, 2002 to file their second round "me-too" bids. Statement of Facts ¶ 19.

On December 26, 2001, Gosselin's managing director sent an email to a landed rate competitor, an unindicted co-conspirator, identifying the 12 channels. Statement of Facts ¶¶ 20, 21. Gosselin's managing director prepared a spreadsheet targeting those channels for elimination and sent it to the unidentified co-conspirator, saying that, by "not taking the low into consideration we would increase the rate level with an average of 3.63 USD ... This is the only thing that in my mind can happen." *Id.* The head of the unindicted co-conspirator organization responded, "[A]gree to your position ... You know if we do not reach and give [the] industry a clear message which rate to base the m/2 [me-too] on, then everyone will use the low [prime] rate and later expect us [the landed rate providers] to reduce our rates so those carriers can work under their m/2 rates." *Id.*

Gosselin sent these emails to the chief executive of Pasha with the note, "I don't know where you are at this moment with [the landed rate to a Pasha freight forwarder] but what rate levels would you be able to support if those [12] states would go to the second level? I think it is important we move rather quickly now. Maybe when you have a chance we can talk in the next days." Statement of Facts ¶ 21. Pasha thereafter allegedly agreed with Gosselin to act to eliminate the prime through rates in 12 of the 26 channels and replace them with higher rates at the second-low level. Statement of Facts ¶ 24.

To implement the agreement, Gosselin's managing director agreed to pay a specified rate to twelve of the largest German packing and hauling agents in return for their agreement not to "handle business" for carriers in the 12 channels unless those carriers filed "me-too" rates at or above the second-low level. Statement of Facts ¶ 22.

On January 8, 2002, in a fax letter edited and approved by Gosselin's managing director, the agents informed U.S. freight forwarders that they "will offer their capacity only to those carriers me-tooing the second rate level into the [enumerated 12] states .... It was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." Statement of Facts ¶ 23. Gosselin sent a copy of this fax to Pasha on January 9, 2002. *Id.*

Through correspondence with FF-1 in the United States, Defendants agreed with FF-1 that it would cancel its prime rates in the 12 targeted channels, on the understanding that no other U.S. freight forwarder would me-too those prime through rates or file a rate below the second-low level. Statement of Facts ¶ 27. To deliver on their promise to FF-1, Defendants obtained the agreement of most of the other U.S. freight forwarders not to me-too the prime through rates in those 12 channels, but instead to file me-too rates at or above the second-low level. *Id.* The carriers overwhelmingly filed me-too through rates at or above the second low level in the 12 targeted channels. Statement of Facts ¶ 28. In the few instances where the carriers either ignored or misunderstood the instructions and filed me-too rates lower than the second-low level, Defendants directed them to agree to cancel those lower rates, and they did. Statement of Facts ¶¶ 29-30. Defendants also supplied misleading information to DOD personnel in Germany to ensure that DOD did not tender any shipments to a freight forwarder with a me-too rate on file below the second-low level. Statement of Facts ¶¶ 29, 31.

The Government contends that as a result of the Defendants alleged conspiracy, DOD overpaid for the transportation of military household goods by approximately $1 million during the summer of 2002. Statement of Facts ¶ 33.

The Parties Arguments

The Defendants argue that the facts as stated above (as agreed to in the Statement of Facts) are a direct consequence of an initial agreement among local German agents to fix the terms and conditions under which they would provide packing services and local trucking services in Germany to U.S. carriers. According to Defendants, the German agents agreed among themselves, in advance of the ITGBL carriers' decision regarding what rates to file with MTMC, not to provide service for any carrier that filed rates with MTMC below a certain level. The German agents thereafter undertook to inform the industry of their agreement and acted to ensure that it would be carried out within the framework of MTMC's regulatory program. *See* Mem. of the Pasha Group in Supp. of Mot. to Dismiss Criminal Information (hereafter referred to as "Pasha Memorandum") at 6. Defendants contend that they had a duty to inform their ITGBL carrier customers of the German Agents' actions, which comprise the Government's charge of conspiracy.

Defendants maintain that Section 1706(a)(4) of the Shipping Act (46 U.S.C. app. § 1706(a)(4)) provides that the antitrust laws allow them an exemption, because their business "concern[ed] the foreign trade segment of through transportation." Section 1706(a)(4) of the Shipping Act provides:

> The antitrust laws do not apply to --
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Defendants contend that this statutory language is broad, with little definition of the terms. Defendants further argue that *United States v. Tucor*, 35 F. Supp. 2d 1172 (N.D. Cal.

1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999), has facts analogous to those at hand, and supports the Defendants' statutory interpretation.

Regardless, even if the Court found that Section 1706(a)(4) of the Shipping Act did not apply to Defendants, because the statute is so ambiguous, Defendants were not given a "fair warning" of criminal conduct, and the statutory and common law rules of lenity mandate that the Court dismiss the pending Criminal Information. Defendants note that they relied upon the holding in *Tucor* in making the determination that their conduct was legal.

Defendants also assert that, independent of Section 1706(a)(4) of the Shipping Act, Section 1706(a)(2) of the Shipping Act also gives Defendants immunity from the antitrust laws. Section 1706(a)(2)(B) states that the antitrust laws do not apply to:

> "any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that ... it is exempt under Section 1715 of this title from any filing or publication requirement of this chapter."

See 46 U.S.C. app. § 1706(a)(2)(B).

Defendants contend that Subsection (a)(2)(B) references Section 1715 of the Shipping Act, which empowers the Federal Maritime Commission ("FMC") to exempt any class of agreements or any specified activity from application of the tariff filing requirements under the Shipping Act. Defendants opine that in order to show that the conduct in the Criminal Information is covered by Section 1706(a)(2)(B) immunity, they must show that (a) the FMC has exempted carriers such as Defendants from a filing or publication

requirement pursuant to its authority under Section 1715 and (b) Defendants' conduct as described in the Statement of Facts constituted activities or agreements for which there was a reasonable basis to conclude that such activities or agreements fell within the scope of the Section 1715 exemption.

Defendants argue that one of the exemptions granted under Section 1715 covers the filing and publication requirements for tariffs in connection with "[t]ransportation of used military household goods and personal effects by ocean transportation intermediaries." *See* 46 C.F.R. § 520.13(c). "Ocean transportation intermediaries" include non-vessel owning common carriers ("NVOCC") and freight forwarders. *See* 46 U.S.C. app. § 1702(17). According to Defendants, they are classified in the Statement of Facts as a NVOCC and therefore they fall within the FMC's Section 1715 exemption from publishing tariffs for military household goods. Statement of Facts ¶ 9. Based on their status as a NVOCC and the resulting exception from having to publish tariffs, Defendants are afforded by statute broad immunity against the antitrust laws.

Defendants also assert that they have immunity against the antitrust laws through Section 7(c)(1) of the Shipping Act. This Section reads:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

Defendants opine that if the Court were to find that they did not have immunity in this case, this section prevents the Government from prosecuting them for antitrust violations,

because they had antitrust immunity for the period before the Court determined that immunity did not apply.

Defendants also assert that the alleged fraud violation is premised on the same conduct that allegedly constitutes the charged antitrust violation. Therefore, Defendants argue, if the Court finds that it has antitrust immunity, it must also dismiss the fraud count.

The Government argues that the Defendants story regarding the German agents conspiracy is outside the scope of the Criminal Information and the Plea Agreement, which all parties agreed to. Therefore, the Government maintains that the Court cannot consider any of these assertions by Defendants.

In addition, the Government contends that *Tucor* does not apply in this case. The Government argues that *Tucor* involved Filipino shippers who shipped only within the Philippines and thus concerned *only* the foreign inland segment of through transportation. The Government maintains that Defendants conduct constituted a conspiracy that not only focused on the foreign inland segment of the transportation--from military bases in Germany to the German port--but extended to the United States.

The Government argues that Defendants reading of the statute raises a perverse escape valve for many antitrust violators doing business overseas that Congress could not have intended. The Government opines that Defendants main argument-- that even if they were involved in through transportation, their conduct did "[concern] the foreign inland segment of through transportation"--is over broad.

The Government also argues that the Shipping Act's 1706(a)(4) immunity does not apply to Defendants. The Government contends that the antitrust immunities provided

for in Section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators" as set forth in Section 4 of the Act. The Government submits that this case does not concern ocean common carriers or marine terminal operators. Therefore, the Government concludes, immunity is not applicable here.

The Government also opines that Defendants' argument for lenity is misguided. Specifically, the Government maintains that the Court should only adhere to the rule of lenity when a statute is so ambiguous that the Court can make no sensible interpretation of it. In addition, the Government argues that most statutes are ambiguous to a degree, and the Court would create bad precedent by finding this particular statute ambiguous.

In addition, the Government contends that the Court should fully read Section 1715 of the Shipping Act, which permits the FMC to exempt from filing, "by order or rule ... any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." The Government opines that the agreement between Defendants referenced in the Criminal Information directly flies in the face of this rule because it fixes the market and is detrimental to both competition and commerce.

The Government also maintains that the exemption authority that Defendants cite, 46 C.F.R. §§ 531 and 536, only exempt Defendants from filing tariffs. It does not extend to any activity associated with the filing of that tariff--in this instance the antitrust violation. The Government contends that the FMC concluded that "existing tariff filings no longer served any regulatory purpose" because MTMC had its own competitive bidding program. 46 Fed. Reg. at 35092. The

Government asserts that the FMC's reliance upon competitive bidding in its actions to exempt carriers such as Defendants from filing tariffs only proves that its intent was not to also exempt antitrust, anti-competitive behavior.

The Government also claims that Section 7(c)(1) immunity does not apply in this situation because Defendants never had any form of antitrust immunity. The Government further contends that Section 7(c)(1) applies to agreements that have been filed with the FMC, and have been effective under the Act or have otherwise been entitled to immunity. The Government asserts that Defendants agreements were never filed with the FMC, and thus, are not covered under this statutory provision. The Government further maintains that the legislative history states that the provisions of Section 7(c)(1) are to protect agreements filed in good faith and valid on their face, while a Court or other tribunal makes a determination as to whether immunity applies or not.

Finally, the Government opines that even if the Court grants antitrust immunity in this case, it can prosecute Defendants under the fraud statute. The Government postulates that where the same conduct violates two different criminal statutes, it can prosecute and punish under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

DISCUSSION

Standard of Review

A motion to dismiss tests whether the Criminal Information sufficiently charges an offense. *United States v. Brandon*, 150 F. Supp. 2d 883, 884 (E.D. Va. 2001), aff'd, 298 F.3d 307 (4th Cir. 2002) (citing *United States v. Sampson*, 371 U.S. 75, 78-79 (1962)). A Criminal Information must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." *Id.* (citing Fed. R. Civ. P. 7(c)(1)).

Court's analysis must extend beyond determining whether the Criminal Information contains the core elements of the charged crime. *Brandon*, 150 F. Supp. 2d at 885. A Criminal Information should be dismissed if its factual allegations, even if proven beyond a reasonable doubt, fail to constitute the crimes charged. *Id.* If the "infirmity in the prosecution is essentially one of law," the Court may, on a motion to dismiss, decide whether the Criminal Information charges a crime. *United States v. Salman*, 266 F. Supp. 2d 1367, 1373 (M.D. Fla. 2003).

ANALYSIS

A. Defendants Version of the Alleged Conspiracy

The Court holds that it cannot consider in its analysis of this case the additional facts that Defendants supply, concerning an initial price-fixing agreement among German agents. This agreement was not within the Statement of Facts. All of the parties, Gosselin, Pasha, and the Government, have agreed that the Statement of Facts and the Criminal Information form the entire factual record for purposes of the Defendants' Motions to Dismiss. *See* Plea Agreement ¶ 3.

Ordinarily, in deciding a motion to dismiss, the "indictment must be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *accord Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n. 16 (1952).

In this case before the Court, the parties have agreed upon a Statement of Facts. Defendants have, in their pleadings, suggested a number of facts involving another agreement with German agents that influenced their actions.

These facts are outside the factual record and this Court cannot consider them in its analysis. *See also United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992).

B. 1706(a)(4) Immunity Under the Shipping Act and Lenity

Even without considering the additional facts that Defendants supply in their Motions to Dismiss, the Court holds that Section 1706(a)(4) of the Shipping Act gives antitrust immunity to the Defendants. In the alternative, the statute is so ambiguous, that the rule of lenity mandates that the Court construe the statute in favor of Defendants.

In interpreting a statute, the Court must first begin with the text. "The starting point for [the] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). "In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it." *Carter v. United States*, 530 U.S. 255, 271 (2000) (Thomas, J.) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)) and (quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment)). Neither the Supreme Court nor any court in this judicial circuit, has interpreted the sections of the Shipping Act at issue here.

The Supreme Court commonly interprets statutory terms according to their common meaning. *See generally* William N. Eskridge, Jr., *et al.*, *Legislation and Statutory Interpretation* 253 (2000) (discussing ordinary meaning canons of statutory construction). If the plain language does not settle the question, then the Court looks to other sources, such as the legislative history, to decipher the meaning of the

ambiguous language. In a criminal case, ambiguous language must be interpreted in defendant's favor under the rule of lenity. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993).

Examining the plain meaning of the statute, Section 1706(a)(4) of the Shipping Act states:

> The antitrust laws do not apply to --
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Unfortunately, "concerning" is not defined within the Shipping Act. However, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The common definition of concerning, which Defendants cite, is "to relate to; to be about; to bear on." Merriam-Webster Online Dictionary, available at *http://www.merriam-webster.com* (last visited August 1, 2004). A "foreign inland segment" is designed as the foreign non-ocean part of transportation. 46 U.S.C. app. § 1702(12). "Through transportation" means continuous transportation between origin and destination for which a single rate is charged and which is performed by one of more carriers between the United States and a foreign port.

Applying the plain meaning of the statute, the Statement of Facts is clear that Defendants' activity did "concern" the "foreign inland segment" of the through transportation. For example, Defendants provided local agent service in Germany. Criminal Information at ¶ 3. Local German agents provided services in Germany. *Id.* at ¶ 10. Defendants

arranged for local German agent services, European port agent services, and ocean transport. *Id.* at ¶ 12.

In addition, one other court, although not the Supreme Court and not a court within the Fourth Circuit, has interpreted this issue on a set of facts somewhat similar to those now before the Court. *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999), remains the only judicial interpretation of the Shipping Act's antitrust exemption as applied to shipping household goods for Government personnel. In *Tucor*, the defendants transported military household goods in the Philippines. In that case, the Government charged the defendant with agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates. The indictment at issue in *Tucor* charged that defendants "caused U.S. freight forwarders to cancel their low rates filed with the U.S. for the transportation of military shipments of household goods between the Philippines and the United States." *Tucor* Indictment ¶ 4(c).

After reviewing the structure of the Shipping Act, the *Tucor* court concluded that Section 1706(a)(4) immunity "means what it says." *Tucor*, 35 F. Supp. 2d at 1180, and held that the antitrust laws do not apply to an agreement or activity to raise prices or boycott freight forwarders that *concerns* the foreign inland segment of through transportation.

The Court also reviewed the legislative history of the Act for any evidence of Congressional intent that might be contrary to the plain language of the statute. The *Tucor* court found none. *See id.* at 1181-82. Specifically, the *Tucor* court held

> "Most notably, there is no discussion in the 98th Congress of the scope of the foreign inland segment immunity. Accordingly, the Court is left to draw inferences from earlier legislative history on previous unenacted versions of the bill. Certainly these inferences, even if on balance they favored the government's position, which they do not, would be insufficient to overcome the plain meaning of the Act."

Id. at 1182.

The Ninth Circuit unanimously affirmed the decision of the District Court. In particular, the court held that "section 1706(a)(4) clearly applies to any agreement--without limitation--concerning the foreign inland segment of through transportation." *United States v. Tucor Intern. Inc.*, 189 F.3d 834, 837 (9th Cir. 1999).

The Government argues that Defendants reliance on *Tucor* is unfounded. The Government argues that *Tucor* dealt with Filipino movers who moved items internally within the Philippines. The Government contends that because Defendants' alleged conspiracy involved contact with carriers and contacts with the United States, the holding in *Tucor* is inapplicable here. The Government also argues that 1706(a)(4) immunity does not apply to Defendants because the antitrust immunities provided for in Section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators" as set forth in Section 4 of the Act. Government argues that this case does not concern ocean common carriers or marine terminal operators--therefore immunity is not applicable here.

The Government's arguments that this exemption only applies to ocean common carriers and marine terminal operators carries little weight. This is the exact same

argument that the *Tucor* court addressed. *Tucor* recognized that section 1706(a)(4) clearly, on its face, was not limited to ocean-common carriers. *Tucor*, 35 F. Supp. 2d at 1178, 1180. Because the statutory language was clear, the court concluded that legislative history was necessary only "to determine whether there [was a] clearly expressed legislative intent that is contrary to the plain language." *Id.* at 1181. The court found that the Shipping Act's legislative history actually favored the defendants' position. *Id.* at 1181-82.

Under a basic reading of the statute, Defendants' actions do "concern" the foreign inland segment of through transportation and should be exempted. The case is somewhat similar to the facts in *Tucor*. In *Tucor*, the defendants transported military household goods in the Philippines, and the Government indicted them on violations of the Sherman Act, charging a price fixing conspiracy that affected the United States. The difference between *Tucor* and this case is that in *Tucor*, the Defendants' actions stopped at the edge of the Philippines. The *Tucor* defendants only moved goods within the country itself. In this case, Defendants' respective companies are involved in all aspects of the move--both the foreign inland segment as well as the entire trip. However, a basic reading of the statute concludes that Defendants' business "concerns" the foreign inland segment.

Even assuming *arguendo*, that Defendants were not immune from the antitrust laws pursuant to Section 1706(a)(4) of the Shipping Act, the rule of lenity mandates that the Court construe the statute in favor of the Defendants. *See United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (holding that the court must decide ambiguities in the statute in the defendants favor).

The Court finds that this statute is clear. Defendants' behavior did concern a foreign inland segment of through

transportation. However, the Court does acknowledge that different definitions of "concern" exist. This Court uses the common definition of concern, which means "to relate to; to be about; to bear on." Merriam-Webster Online Dictionary, available at *http://www.merriam-webster.com* (last visited August 1, 2004); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979).

The Government could argue that Congress's intent was a heightened definition of the word "concern"--such that in order to enjoy antitrust immunity Defendants' conduct would have needed to be exclusively--or significantly-- relating to the foreign inland segment of through transportation. There is no indication in the legislative history that Congress meant this. In fact, there is no legislative discussion regarding the scope of the foreign inland segment immunity. *See Tucor*, 35 F. Supp. 2d at 1182. However, this ambiguity, to the extent it even exists, only favors the Defendants.

Although the Government is correct in pointing out that all statutes, to an extent, are ambiguous, *see Muscarello v. United States*, 524 U.S. 125, 138 (1998), the rule of lenity applies only if "after seizing everything from which aid can be derived ... we can make 'no more than a guess as to what Congress intended.' " *Id.* This is the case here. Congress failed to define what "concerning" means. Specifically, whether "concerning" should be given a broad or narrow definition. This Court uses the common definition of the word. There is no doubt that *Tucor* held that any conduct dealing with the foreign inland segment of through transportation is immune under the Shipping Act. Based upon this holding, it is not unreasonable for the Court to conclude that Defendants conducted their business in accordance with the Ninth Circuit's holding. Therefore, to the extent that an ambiguity exists in the immunity clause under Section 1706(a)(4) of the Shipping Act, this Court must construe it in favor of the Defendants.

C. Shipping Act Immunization Under Section 1706(a)(2)

The Court holds that independent of the antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Once again, the Court's starting point in analyzing this statute is with its plain language. *See Community for Creative Non-Violence,* 490 U.S. at 739. Section 1706(a)(2) of the Shipping Act provides that the antitrust laws do not apply to:

> any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing or publication requirement of this chapter.

Subsection (a)(2)(A) is inapplicable to this case because Defendants' agreement is not on file with the Federal Maritime Commission. Within the scope of the chapter is Section 1707 of the Shipping Act, which requires common carriers to publish tariffs.[2] However, subsection (a)(2)(B)

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[2] A common carrier is defined in the Shipping Act as including non-vessel operating common carriers, which both Gosselin and Pasha are. *See* Statement of Facts ¶ 9; *see also* 46 U.S.C. App. §§ 1702(6) and (17)(B).

references Section 1715 of the Shipping Act, which empowers the Federal Maritime Commission to exempt any class of agreements or any specified activity from application of the tariff.

The Federal Maritime Commission, in rules entitled "Carrier Automated Tariffs," exempts used military household goods transported by ocean transportation intermediaries from publishing a tariff. Defendants also fall within the definition of an ocean transportation intermediary. 46 U.S.C. app. § 1702(17). The exemption states:

> (c) The following cargo types are not subject to the requirements of this part [automated tariffs]: ... (3) *Used military household goods.* Transportation of used military household goods and personal effects by ocean transportation intermediaries.

46 C.F.R. § 520.13(c)(3)(2003) (emphasis in original)

The Court holds that Defendants have a "reasonable basis to conclude," based upon a reading of the above statutes, that they are immune from the antitrust laws because the publication exemption is explicit.

The Government argues two major points against this theory, both of which the Court finds unpersuasive. First, the Government argues that Section 1706(a)(2) immunizes only agreements "within the scope of this chapter." In turn, the Government contends that Section 4 of the Shipping Act "makes clear that the only agreements within the scope of this chapter are agreements among ocean carriers or marine terminal operators." Mem. of the United States in Opp. to Gosselin World Wide Moving N.V.'s and the Pasha Group's Mots. to Dismiss the Criminal Information at 22. The Government contends that neither Defendant is an ocean carrier or a marine terminal operator. This argument carries

no weight, and is simply a rehash of the Government's argument before the District Court in *Tucor*.

Section 4 of the Shipping Act, entitled "Agreements Within Scope of Act," states that the Shipping Act applies to certain agreements "by or among ocean common carriers," and "among marine terminal operators and one or more ocean common carriers." *See* 46 U.S.C. app. § 1702(a) (ocean common carriers), § 1702(b) (marine terminal operators). The Government's argument, in essence, is that this language means that the Shipping Act applies to certain agreements among *only* ocean common carriers and marine terminal operators.

As in *Tucor*, the Court finds that the Government has misinterpreted the "gap" filled by Section 1704(a) of the Shipping Act. Section 1704(a) exempts Federal Maritime Commission from filing "agreements related to transportation to be performed within or between foreign countries ..." *See* 46 U.S.C. app. § 1704(a). As in *Tucor*, "[t]he government's argument ignores the fundamental distinction between 'transportation to be performed within or between foreign countries' and 'the inland segment of through transportation.' " *Tucor*, 35 F. Supp. 2d at 1180. The Shipping Act cannot apply, as the Government argues, to certain agreements among *only* ocean common carriers and marine terminal operators because under such a theory, the statute under 1704(a) would be illogical. Ocean common carriers and marine terminal operators do not operate *within* a foreign country. It is obvious that this language deals with internal transportation, which would preclude ocean common carriers and marine terminal operators.

The Government also argues that Defendants' agreement is not exempted by Section 1715 of the Shipping Act. Section 1715 permits the Federal Maritime Commission to exempt from filing, "by order or rule," "any class of agreements

between persons subject to this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." However, again the Government misinterprets the statute. The statute does not say that the only way Defendants could seek a tariff exemption is through an order or rule by the Federal Maritime Commission. The plain language of the statute states that the Federal Maritime Commission may issue this order or rule exempting a party from the tariff requirement. This Section does not reference Section 1706(a)(2) of the Shipping Act, which Defendants rely upon.

Based upon the above statutory and case law analysis, the Court holds that independent of antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

D. Immunity Under Shipping Act Section 1706(c)(1)

The Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants already have immunity under a plain reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

As described above, Defendants have immunity from the antitrust laws. However, even assuming arguendo, that Defendants did not have immunity under the antitrust laws, Section 1706(c)(1) would grant Defendants retroactive immunity. Section 1706(c)(1) reads:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

Once again, the Court's starting point in analyzing this statute is with its plain language. *See Community for Creative Non-Violence,* 490 U.S. at 739. In examining the plain language of this statute, it is apparent that the purpose of this section is to not penalize parties who in good faith believe that they have antitrust immunity, if a Court takes that immunity away.

Court finds that, based upon the Ninth Circuit's decision in *Tucor,* that the Defendants acted in good faith in considering their actions immune from the antitrust laws. Based upon the Ninth Circuit's holding in *Tucor,* the Defendants could have reasonably concluded that they had antitrust immunity in their activities abroad. This statute expressly prohibits the retroactive application of the removal or denial of immunity under the statute. *Tucor,* 35 F.Supp.2d at 1181-82. Based upon these factors, Defendants would enjoy retroactive immunity.

E. Independent Basis for Fraud

The Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304 (1932). In *Whalen v. United States,* 445 U.S. 684, 691 (1980), the Supreme Court held that courts are to apply this "rule of

statutory construction," described in *Blockburger,* "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Id.*

In this case, the Sherman Act count and the fraud count both require proof of a fact that the other does not. The Sherman Act count requires that the Government show that Defendants had an effect on interstate or foreign commerce but not an effect on the Government. The fraud count, under 18 U.S.C. § 371, requires that the Government show that Defendants defrauded the Government. Section 371 does not require that the Government show that Defendants alleged fraud had an effect on commerce. *See generally United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 223-24 (4th Cir. 1988). The Court has held that Defendants' conduct enjoys antitrust immunity under the Sherman Act. However, applying the *Blockburger* test, the Court concludes that Congress has provided that the Government can prosecute both the Sherman Act count and the fraud count cumulatively. The fact that the Court has found Defendants' conduct under the Sherman Act immune is irrelevant. The Government must, under the fraud count, prove that Defendants defrauded the United States. This is conduct that the Government need not prove under the Sherman Act count.

Defendants argue that conduct that is immune under one law cannot properly serve as the basis of a legal violation under another statute. Defendants contend that this principle is articulated in *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578 (W.D.N.Y.), *aff'd,* 229 F.3d 1135 (2d Cir. 2000), *cert. denied,* 532 U.S. 1037 (2001). The Court disagrees. *Bath Petroleum* was a civil action involving a claim against competitors for making false statements to federal and state administrative agencies that caused plaintiff's business venture to fail. The plaintiff in this

case sued the defendants for violating Section 2 of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The *Bath Petroleum* court dismissed the Sherman Act claim based on the Noerr-Pennington doctrine, which immunizes conduct from the antitrust laws that is directed toward influencing governmental action, such as lobbying or litigation. Defendants argue that since the RICO claim was based upon the same allegedly false statement immunized from antitrust liability by the Noerr-Pennington doctrine, the court also barred the RICO claim. This is not the holding of *Bath Petroleum*. In *Bath Petroleum*, that court held that the Noerr-Pennington immunity applies equally to RICO claims. *See also International Broth. of Teamsters v. Philip Morris*, 196 F.3d 818, 825 (7th Cir. 1999). In other words, although the Noerr-Pennington doctrine originated in antitrust law, its rationale is equally applicable to RICO suits. *Id.* at 826.

Defendants also rely on the Tenth Circuit's holding in *United States v. Beachner Constr. Co.*, 729 F.2d 1278, 1284 (10th Cir. 1984). In *Beachner*, the court held that the double jeopardy clause barred a second trial of mail fraud and antitrust claims against a defendant where the retrial involved the same conspiracy for which the defendant had already been acquitted. *Beachner* did not suggest that the Government would have been foreclosed from prosecuting defendants for mail fraud at the first trial if the antitrust charges had been dismissed. Therefore, the Court holds that the Government states a basis for fraud against Defendants, pursuant to 18 U.S.C. § 371, that is independent of the Sherman Act count.

CONCLUSION

In conclusion, Defendant Gosselin's Motion to Dismiss the Information for Failure to State an Offense is partially

granted, and Defendant Pasha's Motion to Dismiss Criminal Information is also partially granted.

First, the Court holds that under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does "concern" the foreign inland segment of through transportation. As such, Defendants' alleged conduct is immune from the antitrust laws pursuant to the Shipping Act's antitrust immunity provisions.

Second, even assuming *arguendo,* that Defendants' alleged conduct was not immune from the antitrust laws under a plain reading of Section 1706(a)(4), the Court holds that as a matter of law, the statutory and common law rules of lenity mandate partial dismissal of the pending criminal information.

Third, the Court holds that independent of Defendants' antitrust immunity pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Fourth, the Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants have immunity under a plain reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

Fifth, the Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. Where the same conduct violates two different criminal statutes, the Government can prosecute and

punish it under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

For the foregoing reasons, it is hereby ORDERED that Defendant Gosselin World Wide Moving N.V.'s Motion to Dismiss the Information for Failure to State an Offense is PARTIALLY GRANTED.

It is FURTHER ORDERED that Defendant Pasha Group Inc.'s Motion to Dismiss Criminal Information is PARTIALLY GRANTED.

The Court DISMISSES Count One of the Criminal Information.

The Clerk is directed to forward a copy of this Order to counsel.

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

FILED July 12, 2005

No. 04-4752, CR-03-551

UNITED STATES OF AMERICA
Plaintiff - Appellant
v.
GOSSELIN WORLD WIDE MOVING, N.V.;
THE PASHA GROUP
Defendants - Appellees

No. 04-4876, CR-03-551

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
GOSSELIN WORLD WIDE MOVING, N.V.
Defendant - Appellant
and
THE PASHA GROUP
Defendant

No. 04-4877, CR-03-551

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
THE PASHA GROUP
Defendant - Appellant
and
GOSSELIN WORLD WIDE MOVING, N.V.
Defendant

On Petition for Rehearing and Rehearing En Banc

Appellees/cross-appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and As the panel considered the petition for rehearing and is of the opinion that it should be denied, IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Gregory, and District Judge Stamp, sitting by designation.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America	)	
	)	
v.	)	Criminal No.
Gosselin World Wide	)	
Moving N.V.	)	Violations:
and	)	15 U.S.C. § 1
The Pasha Group	)	18 U.S.C. § 371
Defendants.	)	

STATEMENT OF FACTS

The parties agree that had this case gone to trial, the United States would have presented evidence to prove the following facts. The parties also agree that this statement of facts is the stipulated factual record for purposes of the defendants' motion to dismiss.

1. The "relevant period" is the period beginning in October 2001 and continuing until October 2002.

2. Defendant Gosselin World Wide Moving N.V. (GOSSELIN N.V.) is a Belgian company headquartered in Antwerp, Belgium. During the relevant period, defendant GOSSELIN N.V. was in the business of providing, inter alia, services related to the transportation of household goods owned by the U.S. military and civilian Department of Defense ("DOD") personnel and their families ("military household goods").

3. Defendant The Pasha Group ("PASHA") is a United States corporation headquartered in Corte Madera, California. During the relevant period, defendant PASHA was in the business of providing, inter alia, services related to

the transportation of military household goods. During the relevant period, defendant PASHA, through its subsidiary, Gateways International, Inc., provided freight forwarder services to DOD, as described in paragraph 5.

4. DOD administers and coordinates its International Through Government Bill of Lading ("ITGBL") program for the transportation of military household goods between the United States and other countries where U.S. military forces are stationed through the Military Traffic Management Command ("MTMC"). MTMC, as of January 1, 2004 renamed the Surface Distribution Deployment Command, is headquartered in Alexandria, Virginia, in the Eastern District of Virginia.

5. "Freight Forwarders," also known as "forwarders" or "ITGBL carriers" are U.S. companies that submit bids and contract with MTMC and shoulder the ultimate responsibility for ITGBL shipments. Carriers that fail to perform could be penalized by MTMC in their participation in the ITGBL program.

6. "Through rates" are rates filed by freight forwarders directly with MTMC. Through rates are the rates bid to DOD by U.S. freight forwarders and paid by DOD ($/cwt) for all of the moving and transportation services provided in the door-to-door move from Germany to the United States.

7. Each ITGBL move is comprised of five steps. A move from Germany to the U.S. would require: (1) local German agent services, (2) European port agent services, (3) ocean transport services, (4) U.S. port agent services and (5) U.S. destination agent services. MTMC requires that freight forwarders appoint a General/ Booking Agent which serves as the local representative in Germany to receive bookings, and Defendants PASHA and GOSSELIN N.V. as well as

many other companies provided this service for the freight forwarders during the relevant period. "Local German Agents," are firms that provide services in Germany (whether or not they are owned by German nationals or are incorporated in Germany) including "origin" services, such as packing "liftvans" (large wooden crates used for shipping military household goods) at the German living quarters of the soldier or civilian DOD employee returning to the United States, and transporting the liftvans to a warehouse. European port agents arrange for transportation from the warehouse to a port in Northern Europe (Antwerp, Belgium or Bremerhaven, Germany). They also load the liftvans onto U.S. Flag ocean vessels and handle customs and clearance matters.

8. Ocean transport services involve shipping the military household goods from the European port to the most convenient U.S. port location. U.S. port agents arrange to unload the liftvans from the vessel and handle the shipments through customs. A. U.S. local agent then transports the liftvans from the port to the destination location and unpacks the shipment.

9. Under U.S. law, U.S. flag ocean common carriers are required to provide the ocean transport segment of an ITGBL move. Ocean carriers set their rates collectively for ITGBL movements in a conference known as the Trans Atlantic American Flag Liner Operators ("TAAFLO"), organized under the Shipping Act of 1984. Defendants GOSSELIN N.V. and PASHA, as Non-Vessel Operating Common Carriers ("NVOCCs"), are not members of the TAAFLO conference.

10. The freight forwarders participating in the ITGBL program have found an association, known as the International Shippers' Association ("ISA"), to negotiate collectively with TAAFLO to obtain rates for ocean transport

services. The rates are set forth in the service contract between ISA and TAAFLO. Defendant PASHA and a subsidiary of defendant GOSSELIN N.V. are the exclusive co-agents of ISA and receive a commission or fee for their services. All of the freight forwarders that participated in the ITGBL program during the relevant period procured ocean services from either the subsidiary of defendant GOSSELIN N.V. or defendant PASHA.

11. During the relevant period, defendant GOSSELIN N.V., through various subsidiaries and affiliated companies, including GOSSELIN GMBH a company majority owned by defendant GOSSELIN N.V., provided local agent services in Germany.

12. Defendants GOSSELIN N.V. and PASHA offer their freight forwarded customers a "landed rate" - a single rate which combines or bundles origin services, foreign port services and ocean freight and includes a mark-up. To offer this landed rate, defendants GOSSELIN N.V. and PASHA subcontract with other service providers. Defendants GOSSELIN N.V. and PASHA negotiate the landed rate with their freight forwarder customers in advance of each ITGBL filing.

13. Under the ITGBL program, freight forwarders file rates with MTMC twice a year in a two-step bidding process. The rates filed are expressed in U.S. dollars per hundredweight ($/cwt) and are specific to particular "channels." Channels are routes to or from a particular state, or portion of a state, and a specific foreign country (e.g. Germany-Virginia). Of the channels between Germany and the United States, a majority of military household goods "tonnage" moves to and from twenty "high-volume" states. Virginia, with large Army bases such as Ft. Myer and Ft. Belvior, is a high-volume state in the ITGBL program.

14. Each rate submission covers a six-month cycle. The summer cycle runs from April 1 through September 30; the winter cycle runs from October 1 through March 31. The ITGBL cycles are referred to by the abbreviation, "IS" for International Summer or "IW" for International Winter, combined with the relevant year. Thus, "IS-02" is shorthand for the international summer cycle running from April 1, 2002 through September 30, 2002.

15. For each rate cycle, MTMC receives two sets of prices from the U.S. freight forwarders. The first step of the rate filing process, "the initial filing," occurs about four months before a cycle begins, at which time the freight forwarders file initial rates in each channel eastbound and westbound. The forwarders may either file a low rate or an "administrative high" rate in order to preserve their right to match the low rates in the second phase of the rate filing process.

16. After the initial filing, MTMC publishes the lowest five ("low-5") rates offered in each channel and the identity of the freight forwarder filing those low-5 rates. The lowest rate initially bid for a channel is the "prime through rate." The second lowest rate is the "second-low level." In the second phase of the rate filing process, every forwarder that filed any rate in the initial filing has the opportunity to match or "me-too" the prime through rate or to file any rate higher than the prime through rate for each individual channel.

17. Over the course of a cycle, the vast majority of the shipments in each channel moves at the prime through rate. Thus, a freight forwarder must typically me-too the prime through rate in a given channel in order to receive shipments.

18. On or about November 8, 2001, a U.S. freight forwarder filed with MTMC initial rates for ITGBL shipments from Germany to the United States for the IS-02 cycle. That U.S. freight forwarder was not using a landed rate offered by either defendant PASHA or defendant GOSSELIN N.V., but obtained its ocean freight through defendant PASHA, as a co-agent of ISA. In mid-December 2001, MTMC published the low-5, which indicated that this U.S. freight forwarder had set prime through rates for 26 traffic channels from Germany to the United States. In 12 of these channels, there were approximately $3.00 per hundredweight difference between the prime through rate and the second-low level.

19. The deadline for U.S. freight forwarders to file me-too or matching rates with MTMC was January 16, 2002.

20. On December 26, 2001, the managing director of defendant GOSSELIN N.V. sent to a high ranking executive of a competitor landed rate provider and local German agent, an email spreadsheet identifying 12 of those 26 prime through rates filed by the U.S. freight forwarder described in Paragraph 18 for the IS-02 cycle. In this email, the managing director of defendant GOSSELIN N.V. wrote, "If you'll look at the enclosure [spreadsheet] you'll see that with 12 states (of which several are volume states) not taking the low into consideration we would increase the rate level with an average of 3.63 Usd or aprox [sic] 8DM. This is the only thing that in my mind can happen." The e-mail string reflects that the competitor executive replied to defendant GOSSELIN N.V. on December 26, 2001, as follows: "[A]gree to your position. . . . You know if we do not react and give [the] industry a clear message which rate to base m/2 on, then everyone will use the low rate and later expect us to reduce our rates so those carriers can work under their m/2 rates."

21. On or about December 27, 2001, the managing director of defendant GOSSELIN N.V. sent an email and the same spreadsheet to the president of defendant PASHA. In that email, he wrote, "See hereafter some email exchanges between [the competitor executive described in paragraph 20] and myself. Also the file where i [sic] sorted out 12 states set by [the U.S. freight forwarders described in paragraph 18] with quite some money on the table. (Cfr. [Similar] situation last summer) I don't know where you are at this moment with [another freight forwarder that filed prime rates in Germany to U.S. channels], but what rate levels would you be able to support if those states would go to the second level? I think it is important we can move rather quickly now. Maybe when you have a chance we can talk in the next days."

22. By letter of agreement dated January 8, 2002, 12 of the largest German agents, including GOSSELIN GMBH, through its managing director (who is also the managing director of GOSSELIN N.V.), agreed that they would not "handle business" for the freight forwarders in the 12 channels unless the freight forwarders submitted me-too bids at the second-low level or above. On that same day, the managing director of GOSSELIN N.V. also signed an agreement to pay the German agents a specified rate in the 12 channels provided that the shipments moved in those channels at the second-low level.

23. On January 8, 2002, a general agent in Germany for certain U.S. freight forwarders ("the general agent"), drafted a telefax addressed to "All Carriers." Before it was distributed, the general agent sent a copy of the draft telefax to the managing director of defendant GOSSELIN N.V. , who revised the letter. The general agent made the managing director's suggested changes to the telefax, which, as edited, read: "Therefore, the feed back from all agents I have talked to is that they will offer their capacity only to those carriers

me-tooing the second rate level into the following states: US24, US25, US30, US40, US44, US49, US58, US62, US66, US68, US76, US79. It was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." Defendant GOSSELIN N.V. sent a copy of this telefax to defendant PASHA on January 9, 2002.

24. Defendants GOSSELIN N.V. and PASHA and their co-conspirators agreed to eliminate the competitively filed prime through rates in 12 of the 26 channels referenced in Paragraph 18 from Germany to the United States for the IS-02 cycle, including the channel from Germany to Virginia and to replace those 12 prime through rates with higher rates to be filed at the second-low level, with the intent to decrease the through rates paid by DOD.

25. Defendants GOSSELIN N.V. and PASHA agreed with the co-conspirator U.S. freight forwarder described in Paragraph 18 that the freight forwarder would cancel its prime through rates in the 12 specific channels, if no other freight forwarder me-tooed those prime through rates or filed any rate below the second-low level.

26. Defendants GOSSELIN N.V. and PASHA then contacted, through interstate and foreign wires and electronic mail messages, co-conspirator U.S. freight forwarders and directed those co-conspirator U.S. freight forwarders no to me-too the prime through rates in those 12 specific channels and instead, to file me-too through rates at the second low level or higher in these 12 specific channels. Defendants GOSSELIN N.V. and PASHA distributed the general agent's telefax described in Paragraph 23 to most of those co-conspirator U.S. freight forwarders.

27. During these contacts with U.S. freight forwarders, defendants GOSSELIN N.V. and PASHA

obtained the agreement that most of these co-conspirator U.S. freight forwarders would file me-too through rates at the second-low level or higher in the 12 specific channels.

28. Consistent with the direction given by defendants PASHA and GOSSELIN N.V., with few exceptions, co-conspirator U.S. freight forwarders filed me-too rates at or above the second-low level in the 12 specific channels, including the channel from Germany to Virginia.

29. Defendants GOSSELIN N.V. and PASHA and their co-conspirators then agreed that U.S. co-conspirator freight forwarders that filed a rate lower than the second-low level in any of the 12 specific channels would cancel those rates. Consistent with this agreement, defendants GOSSELIN N.V. and PASHA directed particular co-conspirator U.S. freight forwarders to cancel competitively filed me-too rates in some of the 12 specific channels.

30. Co-conspirator U.S. freight forwarders that had filed one or more rates lower than the second-low level in any of the 12 specific channels filed rate cancellations directly with the MTMC, located in the Eastern District of Virginia.

31. In order to ensure that no shipments were tendered to U.S. freight forwarders that had filed below the second-low level in the 12 specific channels, as described in Paragraphs 29 and 30, defendants GOSSELIN N.V. and PASHA and their co-conspirators provided misleading information to DOD personnel in Germany.

32. A substantial percentage of military household goods in the 12 channels moved at the second-low level or higher in the IS-02 cycle. As a result, DOD's costs to transport military household goods were greater than they would have been had the shipments moved at the prime

through rates. A portion of the military household goods shipments affected by the conspiracy included shipments destined for Ft. Myer, Ft. Belvior and other locales within the Eastern District of Virginia.

33. The activities undertaken by defendants GOSSELIN N.V. and PASHA and their co-conspirators during the IS-02 cycle resulted in an increase in the rates paid by DOD for the transportation of military household goods in the 12 specific channels. TO transport military household goods in the specific channels, DOD paid approximately $1 million more than what it would have paid absent defendant PASHA's and defendant GOSSELIN N.V.'s activities.

34. During the relevant period, rates, proposals, contracts, invoices for payment, payments and other documents essential to the provision of ITGBL services were transmitted in interstate and foreign trade and commerce between and among offices of defendants GOSSELIN N.V. and PASHA located in various States and foreign countries.

35. During the relevant period. Defendants GOSSELIN N.V. and PASHA transported, or arranged for the transportation of, substantial quantities of military household goods, in a continuous and uninterrupted flow of interstate and foreign commerce, from Germany to the United States, through various U.S. ports and States, and ultimately to final destinations in various States.

36. During the relevant period, DOD paid for ITGBL services by check, wire transfer, and other monetary instruments transmitted to the bank accounts of co-conspirator U.S. freight forwarders in a continuous and uninterrupted flow of interstate commerce.

37. Defendants GOSSELIN N.V. and PASHA received payments from co-conspirator U.S. freight

forwarders in a continuous and uninterrupted flow of interstate and foreign trade and commerce for services provided as part of the ITGBL transportation of military household goods.

38. The activities of defendants GOSSELIN N.V. and PASHA in connection with the transportation of military household goods were within the flow of, and substantially affected, interstate and foreign trade and commerce.

39. The activities described above were carried out, in part, within the Eastern District of Virginia.

40. The facts described above establish that during the relevant period, defendants GOSSELIN N.V. and PASHA and their co-conspirators entered into and engaged in a combination and conspiracy to eliminate competition by fixing and raising through rates filed with DOD for the transportation of military household goods from Germany to the United States.

41. The facts described above establish that during the relevant period defendants GOSSELIN N.V. and PASHA and their co-conspirators did unlawfully, willfully and knowingly combine, conspire and agree to defraud the United States by increasing the rates paid by DOD for the transportation of military household goods during the IS-02 cycle to levels higher than would have prevailed in the absence of their conspiracy.

(4)

No. 05-677

In the Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V. AND THE PASHA GROUP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that Section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C. App. 1706(a)(4), which grants antitrust immunity to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade," does not immunize an agreement to fix the through rates bid by United States freight forwarders to the Department of Defense for the door-to-door shipment of military and civilian household goods from points in Germany to points in the United States.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 411 F.3d 502. The opinion of the district court (Pet. App. 25a-54a) is reported at 333 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2005. A petition for rehearing was denied on July 12, 2005 (Pet. App. 55a-56a). On September 22, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 25, 2005, and the petition was filed on November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In accordance with a conditional plea agreement, petitioners moved to dismiss an information charging them with one count of conspiring to fix the prices that the Department of Defense (DOD) paid for the shipment of military and civilian household goods from Germany to the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371. The parties submitted a stipulated factual record. Pet. App. 57a-67a. The district court dismissed the Sherman Act count, holding that the challenged agreement is immune from prosecution under the Shipping Act of 1984 (Shipping Act), 46 U.S.C. App. 1701 *et seq.* Pet. App. 40a-50a, 53a. The court denied the motion to dismiss the fraud count. *Id.* at 50a-52a, 53a. Petitioners then entered guilty pleas to the fraud count and were sentenced in accordance with the plea agreement. On cross-appeals, the court of appeals reversed the dismissal of the Sherman Act count, affirmed the judgment of conviction on the fraud count, and remanded for resentencing. *Id.* at 1a-24a.

1. DOD procures transportation services for the movement of household goods of its military and civilian personnel to and from foreign countries through the International Through Government Bill of Lading (ITGBL) program. DOD administers that program through the Surface Distribution Deployment Command (formerly the Military Traffic Management Command) in Alexandria, Virginia. Pet. App. 58a.

DOD solicits bids for through rates from United States freight forwarders, which are companies that contract with DOD and shoulder the ultimate responsi-

bility for shipment. Pet. App. 58a. "Through rates" are the rates bid by U.S. freight forwarders (in dollars per hundredweight) for all the moving and transportation services provided in the door-to-door move from the foreign country to the United States. *Ibid.* The bidding occurs twice a year for six-month cycles (summer and winter) in a two-step bidding process. *Id.* at 60a-61a. In the first step, or "initial filing," U.S. freight forwarders file a through rate for each route—called a "channel." *Id.* at 61a. The low bidder sets the "prime through rate" for that channel, and thereby captures the percentage of the household goods traffic that DOD reserves for the freight forwarder setting the prime rate. The second lowest rate in the initial filing is termed the "second-low rate." In the second step of bidding, the other freight forwarders can match, or "me-too," the prime through rate or can file a higher rate. Typically, a freight forwarder must me-too the prime rate to receive business in that cycle. *Ibid.*

A through rate bid comprises a single rate for five services: (1) origin (local German) agent services; (2) European port agent services; (3) ocean transport services; (4) U.S. port agent services; and (5) U.S. destination agent services. Pet. App. 58a. As subcontractors for U.S. freight forwarders, petitioners Gosselin World Wide Moving N.V. (Gosselin), a Belgian corporation, and The Pasha Group (Pasha), a U.S. corporation, offer a "landed rate," which bundles the local German agent services, European port services, and ocean services, and includes the landed rate provider's mark-up. It thus reflects the handling of the shipment from its German origin to the U.S. port of destination. Petitioners also act as the exclusive co-agents of the International Shippers' Association (ISA), an association of freight for-

warders organized to consolidate household goods for shipment on ocean-going vessels. *Id.* at 57a, 59a-60a. U.S. freight forwarders buy ocean carriage from petitioners, either as part of the landed rate or as a separate service as agents of ISA. *Id.* at 59a-60a. Additionally, Pasha participates in the ITGBL program as a freight forwarder through its wholly-owned subsidiary, Gateways International, Inc., *id.* at 57a-58a, and Gosselin provides local agent services in Germany through its subsidiary, Gosselin GmbH, *id.* at 60a.

Petitioners admitted that, for the summer cycle of 2002, they agreed with U.S. freight forwarders to raise the through rates filed by U.S. freight forwarders in 12 channels from Germany to the United States. Pet. App. 62a-67a. In the initial filing for that cycle, a U.S. freight forwarder, referred to as "FF-1" in the information, filed prime through rates (*i.e.*; submitted the lowest bid) in 26 of the 52 channels from Germany to the United States. FF-1 did not use the landed rate provided by either petitioner but, by negotiating separately with various subcontractors for each step in the transportation, was able to bid through rates that were approximately $3 per hundredweight lower than those of freight forwarders using petitioners' landed rates in 12 of the 26 channels. *Id.* at 62a. In December 2001, DOD published FF-1's prime bids and those of the next four lowest bidders. U.S. freight forwarders then had until January 16, 2002, to file their second-round me-too bids. *Ibid.*

On December 26, 2001, Gosselin's managing director sent an email to a landed rate competitor (an unindicted co-conspirator (UCC), that, like Gosselin, also operated a local German agency), identifying the 12 channels of concern to Gosselin and stating that, by "not taking the low into consideration we would increase the rate level

with an average of 3.63 Usd * * *. This is the only thing that in my mind can happen." Pet. App. 62a. The head of UCC replied: "[A]gree to your position. . . . You know if we do not react and give [the] industry a clear message which rate to base m/2 [me-too] on, then everyone will use the low [prime] rate and later expect us [the landed rate providers] to reduce our rates so those carriers can work under their m/2 rates." *Ibid.*

Gosselin promptly forwarded those emails to the chief executive of Pasha, the remaining landed rate provider in the United States. In that email, Gosselin's managing director noted the 12 targeted channels "with quite some money on the table." Pet. App. 63a. He stated: "I don't know where you are at this moment with [another freight forwarder that filed prime rates in Germany to U.S. channels], but what rate levels would you be able to support if those states would go to the second level? I think it is important we move rather quickly now. Maybe when you have a chance we can talk in the next days." *Ibid.* Pasha thereafter agreed with Gosselin to eliminate the prime through rates in 12 of the 26 channels and replace them with higher rates at the second-low level. *Id.* at 64a.

To implement the agreement, Gosselin's managing director agreed to pay a specified rate to 12 of the largest German packing and hauling agents (including its own subsidiary, Gosselin GmbH) for origin (local German) services. Pet. App. 63a. In return, a German agent sent to U.S. freight forwarders a fax letter, dated January 8, 2002, that had been edited and approved by Gosselin's managing director. *Ibid.* The fax informed U.S. freight forwarders that German agents "will offer their capacity only to those carriers me-tooing the second rate level into the [enumerated 12] states * * *. It

was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." *Id.* at 63a-64a. Gosselin sent a copy of this fax to Pasha on January 9, 2002. *Id.* at 64a.

Petitioners also agreed with FF-1 that FF-1 would cancel its prime rates in the 12 targeted channels, on the understanding that no other U.S. freight forwarder would me-too those prime through rates or file a rate below the second-low level. Pet. App. 64a. To keep their promise to FF-1, petitioners directed the other U.S. freight forwarders not to me-too the prime through rates in those 12 channels, but instead to file me-too rates at or above the second-low level. *Ibid.* The other U.S. freight forwarders agreed, and most of them filed me-too through rates at or above the second low level in the 12 targeted channels. *Id.* at 65a. In the few instances in which a U.S. freight forwarder ignored or misunderstood the instructions and filed me-too rates lower than the second-low level, petitioners persuaded them to cancel those lower rates. *Ibid.* In addition, before the cancellations were effective, petitioners provided misleading information to DOD personnel in Germany to ensure that DOD did not tender any shipments to a freight forwarder with a me-too rate on file below the second-low level. *Ibid.*

2. The government charged petitioners by information in the Eastern District of Virginia, where DOD is located. Petitioners admitted that the conduct at issue constituted a conspiracy to eliminate competition by fixing and raising through rates filed with DOD and that they unlawfully, willfully, and knowingly conspired to defraud the United States. Their conspiracy increased the rates paid by DOD for the transportation of military